

PROFESSORS AND UNIONS: THE FACULTY SENATE: AN
EFFECTIVE ALTERNATIVE TO COLLECTIVE
BARGAINING IN HIGHER EDUCATION?

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I. INTRODUCTION

Where the 1960's was the decade of the 'explosive growth' of collective bargaining for teachers in elementary and secondary schools, the 1970's will witness the arrival of collective bargaining as the primary vehicle of faculty participation in the governance of institutions of higher learning.¹

Whether the above prediction will occur at any particular campus may depend on the alternatives available to the faculty and how effective they are. The purpose of this article is to describe the alternatives available to a faculty desiring a greater degree of self-government and to delineate the problems inherent in those alternatives.

Traditionally, college and university faculties have chosen means other than collective bargaining as a system of faculty governance to

1. Address by Donald Wollett, *Trends in the Law of Collective Negotiations in Education*, unpublished speech presented February 9, 1970, National Symposium on Collective Negotiation in Education, Feb. 9, 1970, summarized in GOV'T EMPLOYEE REL. REP. B-6, No. 337 (Feb. 23, 1970).

represent their interests. There are, however, recent indications that collective bargaining is becoming more acceptable. Section II deals with the campus setting, analyzing the various collegial structures in higher education, the response of their faculties to collective bargaining and the common issues argued by opponents and proponents of unionism.

Section III presents the alternative types of organizations available to a faculty for faculty governance including a faculty senate and a collective bargaining agent; also shown are alternative methods of settling disputes including the use of persuasion, neutral third-parties, and coercion (including the strike), and the likely methods each alternative type of organization might prefer.

Section IV analyzes the role and extent that federal and state legislation play in a system of faculty governance should a collective bargaining agent be chosen. It also points up the potential problem areas that need further examination, including the concepts of exclusivity, scope of bargaining, appropriate bargaining unit and the role of a faculty senate in collective bargaining.

Section V concludes that by studying the alternatives and the merits of each of them, a faculty can make a more informed judgment of its preferred method of self-government.

II. THE CAMPUS SETTING

A. The Nature of Higher Education

1. General Observations

Higher education, which may be defined as all post-secondary education including vocational schools, community and junior colleges, and colleges and universities with their graduate and professional schools,² is generally recognized as an investment in the future well-being of the nation. The cultural, social, economic, and industrial advancement of the nation is becoming more and more vitally linked with the services of higher education. "These institutions are indeed the fountains of new knowledge, fundamental to the growth and progress of society. Even more important, they form the supporting base for the maintenance of our democratic way of life."³

Enrollments in institutions of higher education have nearly doubled in the past decade and have led to a parallel expansion of the number

2. H. SMITH, STATE PLAN FOR HIGHER EDUCATION IN MICHIGAN 9 (1968).

3. *Id.* at 1.

of full and part-time faculty members, now numbering about 400,000.⁴ These educators occupy a sphere of growing importance in our society in that they are entrusted with the education and intellectual formation of our nation's children. Teachers and professors are in a position to fashion thoughts and ideas, goals and directions; and because of their important role in the fabric of our national community, their professional activities are viewed with keen interest.⁵ The question then arises whether or not "professional activities" include designation by faculties of collective bargaining agents, based on the industrial model, to bargain for them?

It has been suggested that faculties of higher education will follow the lead taken by teachers at the secondary education level who are apparently answering the question affirmatively.⁶ Proponents of unionism in secondary education state flatly that until a trade union approach was used in schools, teachers were continuing to be paid in false professional prestige rather than in dollars.⁷ In a recent survey to determine, among other things, the extent to which collective bargaining increased teachers' salaries in Michigan, findings were made that "bargaining seems to have produced pay increases averaging 10-20 percent higher than what teachers would otherwise have received. . . ."⁸

The author of that survey states that the lesson is simply that "hard collective bargaining accompanied by the threat of strikes has paid sub-

4. AMERICAN ASSOCIATION OF HIGHER EDUCATION TASK FORCE REPORT, FACULTY PARTICIPATION IN ACADEMIC GOVERNANCE 9 (1967) [hereinafter cited as TASK FORCE REPORT].

5. Neiryneck, *Teacher's Strikes—A New Militancy*, 19 LAB. L. J. 292 (1968).

6. Michigan is illustrative of the national trend of secondary (and elementary) teachers forming unions. In 1965, Michigan law authorized public employees, including school teachers, to organize into labor organizations and to bargain collectively with public employers over wages, hours, and other terms and conditions of employment. MICH. COMP. LAWS ANN. § 423.208 (1965). Two years later, more than three quarters of Michigan's 590 school districts had recognized unions. C. REHMUS & E. WILNER, *THE ECONOMIC RESULTS OF TEACHER BARGAINING: MICHIGAN'S FIRST TWO YEARS* 2 (1968).

7. Muir, *The Strike As A Professional Sanction: The Changing Attitude of the National Education Association*, 19 LAB. L. J. 615, 618 (1968).

8. The survey also found that in the four years prior to the enactment of Michigan's public employee law

the annual increase in the salary for inexperienced teachers in the 12 districts studied [all now had unionized faculties] averaged 3 percent. In the first two years of bargaining, the average annual increase was three times as large, about 9 percent. The comparable figures for fully experienced teachers holding Master's degrees were 3½ percent in the four years preceding bargaining, and 11 and 10 percent in the first two bargaining years.

C. REHMUS & E. WILNER, *supra* note 6, at 30.

stantial dividends to organized teachers.”⁹ Faculty members in institutions of higher education are looking at this type of experience and asking why the same “dividends” can not be realized by them.¹⁰ With such issues being raised, it is helpful to examine briefly the various institutions of higher education, noting similarities and dissimilarities as regards basic goals of the institutions and of their faculties. With this information, it is hoped that insights may be gained into why some college faculties have rejected traditional methods of academic governance and have instead looked to the trade-union model of decision-making.

2. *Community and Junior Colleges*

Community and junior colleges provide occupational and apprentice programs leading to a two-year terminal degree or, more commonly, provide a program in which the first two years count as college work for those desiring and able to transfer to four-year colleges and universities.¹¹ Traditionally, they have acted in close association with secondary schools, providing students with supplementary skills and technical abilities.

During the 1960's, enrollment in junior colleges increased at a rate nearly twice that of four-year institutions until today there are 800 junior or community colleges in the United States with almost 1.5 million students.¹² Faculty unrest and involvement in labor organization is most intense among the faculties of these institutions.¹³ This point is vividly illustrated in Michigan where faculties of 24 of the 29 two-

9. *Id.* at 31. Apparently, there is no available data as to comparable salary increases realized by non-union teachers outside the twelve school districts studied.

10. One author has suggested that the economic benefits to be derived from collective bargaining in higher education are more imaginary than real, citing as an example an 8.5 percent salary increase at Henry Ford Community College obtained by an exclusive bargaining agent after resort to a strike; however, he noted “the increase was no greater than some of the increases won by a neighboring junior college in the same state without any exclusive bargaining, without a strike, and earlier in the year.” Larsen, ‘*Collective Bargaining*’ *Issues in the California State Colleges*, 53 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BULLETIN 217, 225 (1967) [hereinafter cited as AAUP BULL.].

11. See H. SMITH, *supra* note 2, at 14. In Michigan, community and junior colleges are generally synonymous; however many states designate community colleges as those providing vocational courses and junior colleges as those providing credits transferrable to a four year college.

12. Rehms, *Collective Bargaining and the Market for Academic Personnel*, 8 Q. R. ECON. AND BUS. 7, 8 (1968).

13. *Id.* at 8. See also TASK FORCE REPORT, *supra* note 4, at 10, 37; Ferguson, *Collective Bargaining in Universities and Colleges*, 19 LAB. L. J. 778, 800 (1968).

year public institutions have designated collective bargaining agents. Of these 29 schools, approximately 2300 of the 2600 faculty members are covered by collective bargaining agreements.¹⁴

An important reason why junior college faculties have unionized is their desire for higher wages. In that regard, unions have in many cases met expectations. For example, in Michigan it has been stated that negotiated increases in the Ph.D. salary schedule in community colleges have often been considerably higher than those given voluntarily by the four-year colleges and universities. Today in Michigan, the new doctor of philosophy will be about as well paid in many community colleges as he will at any other institution.¹⁵

The historical ties of the junior colleges with the elementary and secondary school system have been given as part of the reason for junior colleges being the "most successful breeding ground" for gains for collective bargaining agents.¹⁶ Recently, however, there has been a major change in the nature and administration of these two-year colleges in that many are, for the first time, becoming a part of the formal system of higher education. Whereas formerly these institutions were under the control of local boards of education which also governed elementary and secondary education, many have now been integrated into a district or statewide community or junior college system placing strong emphasis on the role of providing the first two years of college work.¹⁷

14. As of May 1, 1970, the AFT's Michigan affiliate, MFT, had four of the agreements, NEA's Michigan affiliate, MEA, had fifteen agreements and nonaffiliated locals had five agreements. Interview with Charles Belknap, Consultant on Higher Education for the Michigan Education Association, May 21, 1970.

15. Rehms, *supra* note 12, at 10. Two years after this observation, it appears that Michigan universities are meeting and exceeding rising junior college faculty salaries. For comparisons of faculty salaries in community colleges in Michigan see MICHIGAN ASSOCIATION OF HIGHER EDUCATION, SUMMARY OF COMMUNITY COLLEGE SALARY SCHEDULES, 1969-70 (1970). A few of the beginning salaries for community college faculty members with doctoral degrees as compared with two Michigan four year universities in 1969-70 are Henry Ford—\$9400; Alpena—\$8,845; Glen Oaks—\$9500; salaries for assistant professors (the rank at which Ph. D. faculty would normally be hired) are: Central Michigan University \$10,000; University of Michigan, (a) College of Education—\$11,000; (b) College of Business Administration—\$12,000. Figures were not available for Michigan's other eleven four year public institutions. University figures based on interview with Charles Allmand, Assistant to Vice President for Academic Affairs at the University of Michigan, June 19, 1970.

16. Ferguson, *supra* note 13, at 800. Professor Donald Wollet of the University of California at Davis recently stated that there are at least 76 junior colleges having collective bargaining agreements with their faculties. THE CHRONICLE OF HIGHER EDUCATION 1 (May 25, 1970).

17. TASK FORCE REPORT, *supra* note 4, at 10.

Often, community and junior college teachers are former public school teachers who have brought with them their teaching approaches, and their attitudes regarding their relationship with the administration.¹⁸ This, combined with the fact that junior college administrators are also frequently selected from the ranks of secondary schools where an autocratic tradition of management has long been the norm, makes for a potential extension of secondary school attitudes in the administration of junior colleges.¹⁹ Although the faculties of many junior colleges have sought to improve their professional status by achieving an expanded role in campus governance, many are still tied to attitudes in which the concepts of professionalism are underdeveloped or non-existent.

In community and junior colleges without a traditional unit of self-government, such as a faculty senate, faculty members may find responsible parties unreceptive to their requests, simply because no forum has been established to guarantee communication between faculty and administration. Thus, a feeling of frustration develops which results in a demand for a greater role in institutional government.²⁰ As the junior and community colleges lean more toward emphasizing college courses, rather than technical skills, so also are the faculties seeking college professors' traditional academic status and rights of participation. Where these desires are not being realized, faculty members are seeking alternative methods by which they may gain control over the role they play in the institution's government. An increasing number of these faculties are choosing collective bargaining as their alternative. Whether this method of faculty governance will enhance a faculty member's opportunity to obtain more power over decisions which will affect and determine his professional role and well-being will be tested at each unionized institution.

A related situation now confronts college educators:

If the faculty members at junior colleges have been aroused by the demand for powers that they never had, the faculty members at many of the four-year institutions have become restive over the loss of control that they once thought was theirs.²¹

18. Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067 (1969); Marmion, *Unions and Higher Education*, 49 EDUC. REC. 41 (1968).

19. Brown, *supra* note 18.

20. See generally Larsen, *supra* note 10, at 225.

21. TASK FORCE REPORT, *supra* note 4, at 12.

3. *Colleges and Universities*

There is a great diversity among the many colleges and universities across the nation. The most apparent distinction is between private and public institutions, each having different sponsors and, therefore, somewhat different responsibilities and methods of financing.²² However, their educational goals and interests, as well as those of their faculties, are often similar, if not identical. Since most new college and university expansion is in the area of public higher education, and enrollment is greater there, this study deals primarily with public institutions. There is very little that will be discussed, however, which will be inapposite for private colleges.

(a) *Professorial Responsibilities*

The basic areas of study in colleges and universities can be divided into the general categories of undergraduate and graduate education.²³ Undergraduate education is usually a four-year program leading to a baccalaureate degree with most of the study done within a particular college. This college may be a separate entity such as a teacher's college, or it may be part of a multi-college university. Its main purpose is to provide students with a general education. Graduate and professional education encompasses all education beyond the undergraduate level. It differs from undergraduate education not only in level but in kind, in that its purpose is to prepare students in a specialized area of study which requires greater scholarship by both student and faculty. Graduate school is usually an extension of the undergraduate college; whereas, professional schools are a separate entity within a university.

It has been said that a faculty is the university.²⁴ Traditionally, its area of concern has encompassed academic standards, faculty selection and promotion, curriculum planning, salary matters, and those aspects of student life which relate to the educational process. The university professor spends most, if not all, of his time on academic matters, primarily involving himself with the transmission of knowledge to stu-

22. In 1968, there were approximately 1000 public institutions and 1489 private institutions. Public colleges and universities tend to be larger and grow faster than their private counterparts with 29 percent of the student population enrolled in private colleges and universities (2,102,000 students). See AMERICAN COUNCIL ON EDUCATION, A FACT BOOK ON HIGHER EDUCATION 8117, 9009 (1969).

23. H. SMITH, *supra* note 2, at 9.

24. TASK FORCE REPORT, *supra* note 4, at 27.

dents.²⁵ Typically, he will meet twelve hours of classes a week, and in addition to ministerial duties, hold irregular conferences with students. Although helpful at promotion time, research and writing are not required and are performed only to the extent appropriate to meet the requirements of the teaching function.²⁶

Normally, the graduate or professional faculty member will meet formal classes six to eight hours a week and hold conferences to direct advanced work by graduate students. Additionally, he is expected to carry on substantial research and writing, undertaking such teaching as is appropriate to his function as a creative scholar. Thus, the total work load of either an undergraduate or graduate faculty member is for most purposes about the same, although the nature of the work may differ.

With these types of responsibilities, it is interesting to note by which type of organization college and university professors will choose to govern themselves. In this sector of higher education, there still appears to be a relative scarcity of formal collective bargaining between faculties and their administrations, at least as compared with its widespread use in the junior colleges. There is mounting evidence, however, indicating that unionization of college and university faculties will become more common.²⁷

(b) Survey of Collective Bargaining by Faculties

During the current year and in recent years, a dramatic increase has occurred in the number of faculties which have embraced collective

25. An academic faculty at a university consists of many non-teaching faculty members such as library and research personnel; however, because most faculties have not included these groups within their system of faculty governance, they are not discussed under this section.

26. A study of 1000 faculty members at a large university showed that 32 percent had not published any articles and 71 percent had not published any books. Wilson, *The Academic Man Revisited*, STUDIES OF COLLEGE FACULTY 5 (The Western Interstate Commission for Higher Education 1961).

27. One writer suggests

the most important deterrent to membership [in unions at the college level] remains the reluctance of teachers to become identified with blue-collar workers. The majority of teachers come from what sociologists term 'upwardly mobile' families—a group that is strongly white-collar conscious. This bias, coupled with lack of real interest among college teachers . . . may offer formidable roadblocks to entrance of the public school organizations onto the college or university campuses in any great numbers.

Brown, *Collective Bargaining on the Campus: Professors, Associations and Unions*, 21 LAB. L. J. 167, 176 (1970).

bargaining. It has been predicted that this trend will increase more dramatically over the next two or three years.²⁸

In recent years, unions and professional associations have made the following organizational claims. As of 1967, the American Federation of Teachers claimed 104 locals at the college level;²⁹ however, it has been duly noted that despite its relatively numerous affiliate chapters, it "probably did not have more than a dozen contracts in effect at the end of 1968."³⁰

The National Education Association, on the other hand, claimed that by 1967 it represented eight college faculties, having negotiated collective bargaining agreements for three of them.³¹ The American Association of University Professors, as of 1968, represented only one faculty and had negotiated a contract there.³² Development of unionization of faculties in recent years has been mild when compared with the activities of the past year.

New York, with its sophisticated public employee legislation, has witnessed the greatest increase in unionization of college faculties.³³ In the fall of 1969, the Legislative Conference, now an affiliate of the NEA, representing City University of New York's full-time professional staff, and the United Federation of College Teachers (UFCT-AFT), an affiliate of the AFT, representing the university's part-time professional staff, negotiated separate contracts with officials of the City University of New York. These two contracts are believed "... to be 'firsts' in the sense they include a complex publicly supported higher educational system, including four-year undergraduate institutions, covering nearly 10,000 professionals."³⁴

28. Address by McHugh, *Recent Developments in Collective Bargaining in Higher Education*, speech presented at the June, 1970, meeting of the National Association of College and University Attorneys, San Diego, California, June, 1970, to be published in *COLLEGE COUNSEL*.

29. Ferguson, *supra* note 13, at 800-01. By May, 1970, the American Federation of Teacher's Director of Colleges and Universities, Richard Hixon, claimed 200 locals on college campuses. *THE CHRONICLE OF HIGHER EDUCATION* (May 25, 1970).

30. Brown, *supra* note 18, at 1067-68.

31. Ferguson, *supra* note 13, at 800-01.

32. *Id.* Since that time it has been designated collective bargaining agent for the faculties at Rutgers, St. John's University and Oakland University. See McHugh, *supra* note 28.

33. In the fall of 1969, of thirty community colleges outside New York City, there were 16 negotiated contracts. McHugh, *Collective Negotiations in Public Higher Education*, 47 *COL. & UNIV. BUS.* 41, 42 (1969).

34. *Id.* at 43.

At State University of New York a representation proceeding was commenced by various labor organizations, including AFT and AAUP affiliates and the State University Faculty Senate, all of which sought to represent the approximately 11,000 faculty members as its bargaining agent.³⁵ A hearing was held before the state labor board which found the appropriate bargaining unit to be a statewide employee unit of all professional employees. An election was anticipated in early 1971.

New York has also had faculties from its private colleges seek union representation.³⁶ In March, 1970, a representation election was held at St. John's University among full-time and regular part-time faculty with the Faculty Association and the AAUP on the ballot. Subsequently, the Faculty Association and AAUP agreed to be jointly certified, and they are currently engaged in negotiations with the St. John's University administration.³⁷

In New Jersey, faculties of public institutions have also formed unions. In 1969, elections were held at each of the six New Jersey State Colleges.³⁸ The local chapter of the New Jersey State Faculty Association (SFA), an affiliate of the New Jersey Education Association and NEA, won the election and was certified at each of the campuses. In the summer of 1969, negotiations were commenced between SFA and the New Jersey State Board of Higher Education on a state-wide-level for all six campuses, while simultaneous negotiations on local issues were held at the local campuses. Negotiations stalled when it became unclear whether SFA should bargain with the Governor's office or the Board of Higher Education. An impasse was reached on the issues of salary, binding arbitration, and the duration of the contract. Mediation was attempted and failed. Thereafter, negotiations resumed only to reach another impasse. A fact-finder was called in, but to date he has rendered no decision.

35. McHugh, *supra* note 28.

36. Although faculties at Cornell and Syracuse Universities have not requested a representation election, the universities recently petitioned for and obtained jurisdiction of the NLRB over their non-academic employees. See Cornell University, 183 NLRB No. 41, 74 L.R.R.M. 1269 (1970).

37. McHugh, *supra* note 28. The results of the election were Faculty Association: 225; AAUP:215; challenged:23; void:3. Interestingly, the law faculty at St. John's University was not included in the faculty unit currently engaged in negotiations, and it has recently petitioned the state labor relations board. Its unit includes full-time and adjunct professors but not visiting lecturers. The bargaining agent is an independent organization called the Law Committee on Collective Bargaining. Negotiations have not yet begun. *Id.*

38. McHugh, *supra* note 28.

At Rutgers University, the AAUP chapter was recently designated as collective bargaining agent for the entire faculty, excluding the professional support staff.³⁹ Negotiations began in early 1970 and tentative agreement has been reached on the total salary increase, but not as to its manner of distribution whether by merit or by across the board increase. The entire percentage increase is subject to approval by the executive branch of the state government which has not yet acted.

Faculties at Michigan's public universities have also recently expressed interest in unions. In September, 1969, the Michigan Association of Higher Education was certified as the bargaining agent for Central Michigan University's faculty. The faculty unit included full-time faculty members holding the rank of lecturer or above and who carried a work-load of at least one-half teaching and research.⁴⁰ A contract was negotiated in March, 1970.

At Oakland University, the AAUP filed a petition in April, 1970, seeking to represent academic rank faculty, post doctoral fellows, librarians, and instructors.⁴¹ At the time the petition was filed, Oakland was in the process of severing its affiliation with Michigan State University, and the state labor board held the representation election in abeyance until that transaction was completed.⁴² In the fall of 1970, the AAUP won the representation election and bargaining was scheduled to begin in January, 1971.

The faculty at one of the fourteen colleges of Michigan State University petitioned for a representation election seeking to designate the Michigan Association for Higher Education as its bargaining agent.⁴³ The proposed unit would include faculty rank staff, but exclude deans, assistant and associate deans and department chairmen. The matter is presently before the state labor board.⁴⁴

At the University of Michigan, separate petitions have been filed by the Intern-Residents Union seeking to represent interns, residents and

39. *Id.*

40. The bargaining unit also included librarians, coaches, counselors, department chairmen, and part-time faculty who carry a two-thirds load. Excluded were graduate assistants, visiting faculty, directors, coordinators, deans, vice presidents and president. Interview with Charles Belknap, *supra* note 14.

41. McHugh, *supra* note 28.

42. Oakland's independence came on July 1, 1970. Interview with William P. Lemmer, attorney for the University of Michigan (Nov. 10, 1970).

43. *Id.*

44. The University contends that the appropriate unit would be the faculty of all the colleges. A decision from the state labor board was expected by early fall, 1970. *Id.*

fellows, and by the Teaching Fellows Union seeking to represent teaching fellows.⁴⁵ Both matters are presently before the state labor board, with the University contending that teaching fellows are not employees but students whose work functions are part of their educational program. It adds that, if they are employees, their bargaining unit should appropriately include other graduate students whose employment responsibilities are part of their educational program.

Some faculty members at a number of state colleges in New Mexico, Arizona, California, and Pennsylvania have also sought collective bargaining in the past year, but were unsuccessful.⁴⁶ Whether the faculties' selection of unions at large public institutions is a trend which will continue or whether it is merely experimentation with different methods of faculty governance is speculative. That the former will be the case is suggested by two recent surveys in which selected faculties indicated that, although collective bargaining may be ill-advised, it is probably inevitable.

The American Council of Education reported a survey which showed that 75 percent of faculty members queried thought there is an even chance or better that collective bargaining will be widely adopted as a method of determining faculty salaries and conditions of employment; 56 percent considered collective bargaining undesirable or detrimental.⁴⁷ In a more recent survey of 60,447 faculty members across the country, the following statement was submitted: "Collective bargaining by faculty members has no place in a college or university." The results were that 19.1 percent agreed strongly, 23.5 percent agreed with reservation, 33.7 percent disagreed with reservation, 20.4 percent disagreed strongly—thus, 54.1 percent disagreed with this statement.⁴⁸

Whichever alternative a faculty may choose, a faculty senate, a union, or a combination of the two, debate among faculty members will be

45. A decision from the state labor board was expected by late fall, 1970. *Id.* At the University of Wisconsin, the teaching assistants elected the Teaching Assistant Association as their bargaining agent. After a one month strike over the issue of how much decision-making power teaching assistants could have over educational issues, an agreement was negotiated in April, 1970. See THE CHRONICLE OF HIGHER EDUCATION 3 (March 30, 1970).

46. THE CHRONICLE OF HIGHER EDUCATION 6 (May 25, 1970).

47. THE CHRONICLE OF HIGHER EDUCATION 6 (October 28, 1968); see also AMERICAN COUNCIL ON EDUCATION, THE FUTURE ACADEMIC COMMUNITY: CONTINUITY AND CHANGE 140 (1968) where a poll of college administrators showed 40 percent expecting collective bargaining to become commonplace, with 90 percent stating they did not like the prospect.

48. THE CHRONICLE OF HIGHER EDUCATION (April 6, 1970).

lively and unpredictable. There are, however, recurring arguments raised at any debate by proponents and opponents of unionism regarding its appropriateness as a means of faculty governance. Some of the more common arguments relate to a college professor's concern about professional status: (a) would acceptance of the employee status cause damage to his professional status? (b) would his academic freedom and freedom of choice be diminished? (c) would the industrial relations model with its strike weapon be appropriate as a method for academic governance? Since these are the issues over which professors debate when deciding whether or not to form a union, it would be useful to analyze them more closely.

B. The Professor and Issues Regarding Collective Bargaining

1. The Professor as a Professional

(a) A Community of Scholars?

The above questions are inextricably tied to the notion of professionalism and the image it generates in the mind of the university community.⁴⁹ That community, ideally, is an educational "community of scholars" devoted to the pursuit and communication of knowledge through research and teaching. Opponents of unionism in higher education attempt to justify their opposition by claiming that collective bargaining is inappropriate for the college professor because he is a scholar and thereby able to order his own affairs.⁵⁰ This view is shared by many present day academics who cherish the university as a community of scholars.⁵¹ As a former chancellor of Berkeley stated:

Our university house has many mansions. Though the dwellers therein speak in tongues of their specializations, they belong to a single community of scholarly endeavor. Whatever impedes, adulterates, or thwarts that endeavor is a menace to the mission of the community.⁵²

Others, recognizing the merits of the ideal, see the community of scholars concept as an "earnest, anachronistic appeal for return to a time that

49. See generally Rehms, *supra* note 12, at 9.

50. Hamilton, *Will the College Teacher Organize?*, 1962 INDUS. UNION DEPT. DIG. 128.

51. See generally Lunsford, *Who Are Members of the University Community?*, 45 DENVER L. J. 545 (1968); *Representation of Economic Interests*, 52 AAUP BULL. 229, 233 (1966).

52. Strong, *Shared Responsibility*, 49 AAUP BULL. 109, 113 (1963).

never was, when all interests among students, faculty, and the society could be reconciled without covert or open conflict.”⁵³ To which view a particular faculty member subscribes depends upon his personal beliefs concerning the nature of professionalism and his own role within that concept.

(b) *Professionalism*

Professionalism has been defined as allegiance to a particular set of beliefs, ideas, and convictions concerning the conditions under which one's work is or should be performed. This set of ideas centers principally upon three concepts, “that of specialized expertise, of autonomy, and of service.”⁵⁴ Autonomy carries with it the emphasis that the professional himself must have final responsibility, albeit with the advice and consultation of his colleagues, to determine how his work is to be done, how and what problems should be dealt with, what values should be sought, and what the criteria for distinction are.⁵⁵

Justice Brandeis in defining and distinguishing professions from occupations, noted three prevalent characteristics:

First: A profession is an occupation for which the necessary and preliminary training is intellectual in character, involving knowledge and to some extent learning as distinguished from mere skill.

Second: It is an occupation which is pursued largely for others and not merely for one's self.

Third: It is an occupation in which the amount of financial return is not the accepted measure of success.⁵⁶

Although this definition was written in 1912, it may still be accurate, especially with regard to the third point. Studies have indicated that economic aspects of teaching have often been secondary to other considerations such as class size and participation in campus government in recent expressions of faculty unrest.⁵⁷ This is not to suggest that salaries

53. Lunsford, *supra* note 51, at 546.

54. Kadish, *The Strike and the Professoriate*, 54 AAUP BULL. 160, 161 (1968).

55. *Id.*

56. Miller, *The Personnel Dilemma: Profession or Not?*, 38 PERSONNEL J. 53 (June 1959), Cornell University, Reprint Series No. 84 (1959). Miller adds that the “decisive feature distinguishing professional from other activities is this: that members occupy a peculiar position of trust toward the public and to a special clientele (students).” *Id.* at 54.

57. TASK FORCE REPORT, *supra* note 4, at 13.

are not foremost in professors' assessments of their positions; rather it indicates a feeling of equal or paramount interest in educational and self-government matters.

Some feel that present systems of self-government do not recognize professionalism in its full sense.

[Teachers] are the victims of a kind of one-dimensional professionalism: professional responsibility without professional authority. It is as if one were to say to a doctor: "The health of the patient is in your hands but someone else will make the diagnosis and prescribe the therapy."⁵⁸

That argument continues that to achieve true professionalism and its recognition by college administrators, organization and militancy are needed.⁵⁹

(c) *Professionalism Versus Employee Status*

Faculty members raise the question of whether acceptance of employee status derived from designation of a collective bargaining agent will reduce their professional status. Put another way, is the designation of a professor as an employee an improper selection of a single aspect of his status and an exclusion of others, or is it a reasonable and realistic appraisal of his relationship with the administration for most purposes? Unions traditionally emphasize the latter. It has been stated that "... the typical union official sees only a terminology difference between the college teacher and the industrial worker."⁶⁰ Even opponents of unionism admit that "... university professors are employees by definition ... unlike proto-typical professionals—lawyers and doctors [who are] free-lance and totally independent in their relationships with those they serve."⁶¹ It is argued, however, that this does not preclude realization of the professional ideals of autonomy and service which comparatively constitute so much more of the attributes of the university professor. To represent only the "employee's" interests would be to overlook these other attributes.

58. Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017, 1020 (1969).

59. R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 122 (1967); see generally Rehmus, *supra* note 12, at 9.

60. Brown, *supra* note 27, at 168.

61. Kadish, *supra* note 54, at 162.

2. *Effect of Collective Bargaining on Academic Freedom and Professional Autonomy*

Many professors are of the opinion that the "primary right and responsibility of the academic man is always to cherish academic freedom."⁶² Traditionally, college and university faculties, under the principles of academic freedom and professional autonomy, have sought to attain a high degree of professional self-government whereby they can control or strongly influence "the education and certification of entrants to the profession; the selection, retention and promotion of their members; the content of the curriculum; work schedules; and the evaluation of performance."⁶³ Professors have also sought a system of faculty governance designed to enhance professional autonomy to the extent necessary to encourage the maximum intellectual productivity. Historically, academic freedom has not been intended as a shibboleth to protect the eccentric or the unorthodox, but rather as a requirement for high level intellectual performance, protecting the academic from excessive judgments on the efficacy of teaching methods and content, by those within and without the profession.

It is frequently argued that collective bargaining infringes upon the concept of academic freedom and personal choice and could lead to uniformity.

Collective bargaining inherently subjects many policy determinations to the rule of the organizational majority, and the majority rule often reflects deep suspicion of individual initiative or advantage. Thus collective negotiations could have an adverse effect on teachers with special ability.⁶⁴

To union opponents the prospect of designation of a bargaining agent would necessitate weighing the possible imposition of such industrial practices as job descriptions, which arguably limit and depreciate professional norms and prerogatives, against the concomitant increases in equality and fairness, if all would share more equally in work distribution and remuneration under union organization.

62. Brown, *Rights and Responsibilities of Faculty*, 52 AAUP BULL. 131 (1966).

63. Garbarino, *Professional Negotiations in Education*, 7 INDUS. REL. 93 (1968).

64. Wollett, *supra* note 58, at 1029. The author points out that faculty resistance to change often exists in a non-union setting.

3. *The Appropriateness of the Industrial Relations Model for Faculty Governance*

The basic question, underlying and including the correlative issues raised above, is whether the industrial relations model is appropriate as a method for academic governance. The question of appropriateness relates closely to how faculty members view their relationship with the college or university administration. The *Task Force Report* on faculty governance suggested that "relationships between the faculty and academic administrators should be, to the greatest feasible extent, collegial rather than hierarchial."⁶⁵ This envisions a system of faculty government based on shared responsibility and authority, where built-in hierarchical conflicts are at a minimum. If, however, a faculty views its role with the administration as superordinate and subordinate, instead of collegial, then acceptance of an industrial relations approach to faculty governance would be more predictable.⁶⁶

Critics of the industrial relations approach to faculty governance argue that it artificially and inappropriately creates an adversary relationship between the administration and the faculty and encourages and maintains a permanent conflict between the two, requiring confrontation, collective bargaining and coercive sanctions.⁶⁷ The Task Force on Faculty Governance has taken a position that collective bargaining principles in faculty governance are inappropriate. It stated that it is important that the governance of an academic institution should "not be viewed as a competitive process in which the augmentation of the influence of one party automatically diminishes the influences of other parties."⁶⁸ Through cooperation, it is proposed, both parties may be able to achieve their goals more fully than would be possible through antagonistic competition.

Proponents of the industrial relations model emphasize that differences will inevitably arise between faculty and administration, and a unified effort is needed to influence and pressure administrators to the union's preferred policy.

65. TASK FORCE REPORT, *supra* note 4, at 25.

66. Williams, *An Academic Alternative to Collective Negotiation*, 49 PHI DELTA KAPPAN 571, 573 (1968). The author suggests that subscribers to this view can only hope to influence the relationship rather than effect changes in the institution's system of faculty governance. See also Wildman, *What Prompts Greater Teacher Militancy?*, AM. SCHOOL Bd. J. 29 (March 1967).

67. Williams, *supra* note 66, at 572. See also McConnell, *Faculty Interests in Value Changes and Power Conflicts*, 55 AAUP BULL. 340, 350 (1969).

68. TASK FORCE REPORT, *supra* note 4, at 24.

The American Federation of Teachers has taken the position that collective bargaining provides conditions of equality between the administrators and the teaching staff "and the cant and hypocrisy of all sorts of advisory . . . committees, senates and councils are swept away and *real negotiations* can take place."⁶⁹

The meaning of "real negotiations" may be open to different interpretations and create an issue in itself. For example, former President of the University of Michigan, Harlan Hatcher, in a speech depicting possible implications of bargaining by the university staff, stated in colorful terms that bargaining is a tricky word connoting "haggle" and "wrangle" which meaning slides into "noisy quarrel" with synonyms of "bickering, controversy, and brawl."⁷⁰ He added:

What began as presumptive bargaining in good faith results all too often in outright economic warfare, calling upon tribal rituals, an archaic script for the actors, irrational round-the-clock sessions to reach a settlement to meet an artificial deadline and collective bludgeoning, in a heated-up mood of strife, with the slogan of get all you can and everybody else be damned.⁷¹

Another issue raised under the question of appropriateness, which is at the very heart of the controversy, is whether private sector concepts should be or would be infused into the public sector, and therefore into the university, by a faculty which unionizes. Typically, state labor legislation distinguishes only between private sector employees and public sector employees, not singling out teachers or professors by special legislation.⁷² This type of legislation, it is argued, "cannot help but reflect the interest of the largest classifications of covered employees, which happens to be blue-collar or sub-professional employees."⁷³ Professional associations such as the National Education Association maintain that lumping together all public employees dilutes the concept of professionalism;⁷⁴ whereas, the more militant American Federation

69. McConnell, *supra* note 67, at 350 (emphasis added).

70. Address by Hatcher, *Alexander F. Morrison Lecture*, Sept. 22, 1966 (unpublished). See also Walter, *An Alternative to Collective Bargaining*, 155 AM. SCHOOL Bd. J. 26, 27 (1968).

71. Hatcher, *supra* note 70.

72. For a summary of state legislation see Ferguson, *supra* note 13, at 784-91.

73. Doherty, *The Law and Collective Bargaining For Teachers*, 68 TEACHERS COLLEGE RECORD No. 1 at 20 (1966).

74. Doherty, *supra* note 59, at 57.

of Teachers is less concerned, because it sees no basis for the dichotomy.⁷⁵ The effect of such legislation is that labor law concepts developed through cases involving non-academic employees will be applied equally to academic employees. Some faculties view this as inappropriate.

Often, public employee legislation, under which unionized faculties would operate, is administered by the same agency which administers private sector labor legislation. This creates greater potential for the adoption and fusing of common labor law concepts. Opponents of faculty unionism argue that the collective bargaining concept as adopted from the industrial and commercial world is too limited and rigid and, in a real sense, runs the danger of dividing the academic community artificially and unnecessarily into bargaining components, and it is therefore inappropriate.⁷⁶ In that regard, New York has recently established a separate agency for administering public employee law. Professor Russell Smith of the University of Michigan noted that the implied rationale underlying the establishment of New York's separate agency was that:

. . . novel approaches may be required to deal with the unique problems of unionism in the public sector, the necessary expertise should be permitted to develop unhampered by any preconceptions . . . of private sector legislation.⁷⁷

New York, however, is in the minority by establishing a separate agency.⁷⁸ Since most state laws are modeled upon the arrangements prevailing in industry, although colleges and universities have traditionally developed very different arrangements for faculty representation, it would appear that unionized faculties will incorporate private labor legislation concepts regardless of whether it is viewed as appropriate.

Another facet of the question of appropriateness deals with the issue of whether bargaining agents would be qualified to bargain on issues related to educational subjects like curriculum, tenure and selection of chairmen (assuming such subjects were deemed to be within the legal scope of bargaining). Union proponents argue that the representatives

75. *Id.*

76. See generally Brown, *supra* note 27, at 171. See also Davis, *Unions and Higher Education: Another View*, 54 AAUP BULL. 317, 320 (1968).

77. Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 899 (1969).

78. *Id.*

with the aid of faculty committees would be qualified. Opponents argue that faculty, rather than outsiders, should bear the main responsibility for determining their own standards of performance because laymen would be hard pressed to distinguish good from bad practice. As one opponent stated:

For others to direct . . . what or how to study and teach risks not only the misjudgment of the unqualified, but the distortion of those with special interests, whether they be administrative convenience, prejudice or social acceptability—interests to which the pursuit of knowledge is particularly and acutely vulnerable.⁷⁹

Some faculty members deem unionization in colleges as inappropriate because they foresee an elaborate network of rules and regulations accompanying the union. One author was moved to write:

Grievance procedures, impasse systems, and job descriptions are carefully defined and meticulously maintained. One cannot help but wonder if teachers are not ultimately substituting teacher-imposed rules and regulations for those formerly imposed by school management.⁸⁰

A final argument dealing with the appropriateness of union representation of faculties centers on the extent of reliance by a union on the strike weapon. Opponents of unionism argue that collective bargaining and the threat of a strike undermine professorial claims of professional commitment and commercialize its endeavors.

The move from academic senates to collective bargaining backed by the strike is a move to the market place, and the spirit of the market place is that you are entitled to what you can exact, and what you can exact is what you're entitled to. . . . Exaggerated claims and over-stated positions become the currency of compromise.⁸¹

Supporters of collective bargaining by academic faculties contend that perhaps militancy is the only way to achieve the idealistic goal of professional status. As one observer stated:

79. Kadish, *supra* note 54, at 162.

80. Williams, *supra* note 66, at 572.

81. Kadish, *supra* note 54, at 164.

Ironically, they may achieve this status by first learning how to act like militant trade unionists, thus securing the economic base that will allow them to concentrate on professional problems.⁸²

The wisdom of these views must be evaluated at each institution choosing between existing structures of faculty governance such as the traditional model of an academic senate, or a different means such as collective bargaining. It has been suggested, however, that neither model will persist, but rather a hybrid will develop.

. . . [O]rganization of professional employees—both those which call themselves unions and those which do not—will increasingly take their rhetoric from the . . . professional model [as exemplified by doctors and lawyers], their goals and status aspirations from the academic model, and their tactics from the union model. In brief, they will do their best to look and sound like professional societies but, if necessary, will act more like unions.⁸³

With this admonition in mind, an analysis is made of specific alternative systems of government available to university faculties, including a faculty senate and a collective bargaining agent.

III. ALTERNATIVE ORGANIZATIONS FOR FACULTY GOVERNANCE AND METHODS OF DISPUTE SETTLEMENT

A. Roles of Faculty and Administration

Fundamental to any effective system of faculty governance is proper allocation of authority between faculty and administration.⁸⁴ Ideally, the system will permit those most qualified to make decisions in their area of competence. There are several possible authority relationships between the faculty and the administration ranging from dominance by the administration to dominance by the faculty. The *Task Force Report* recommended that a middle approach of "shared authority" be used wherein both faculty and administration exercise effective influence over decision-making in their respective areas of concern.⁸⁵

82. R. DOHERTY & W. OBERER, *supra* note 59, at 125.

83. Garbarino, *supra* note 63, at 93.

84. See generally Williams, *supra* note 66 for a comparison of the "industrial relations approach" with the "academic alternative" as regards the distribution of authority.

85. The TASK FORCE REPORT indicated that 25 percent of the institutions it studied were characterized by administrative dominance, mostly in the junior colleges, 50

Traditionally, there are certain areas of a university's operations which are of primary concern to either the administration or the faculty. Certainly, there is no blanket formula for the role of administrators in the governance of an institution. There are, however, certain areas in which they are expected to exercise authority because of legislative direction or because the situation is within their special competence. The *Task Force Report* identified six areas in which administrators have special competence: (1) over-all leadership; (2) coordination of the activities of the competent parts of the institution; (3) planning and innovation; (4) maintaining quality standards of the institution; (5) acting as a buffer between the board of trustees and faculty; and (6) business management.⁸⁶ Obviously, administration officials need not have, nor do they necessarily desire, unilateral control over the implementation of all of these operations. There are many areas where faculty members should be consulted, and are consulted, so that they may contribute to the input portion of the decision-making process and bring their special knowledge and points of view to bear on the problem under consideration. Most of these areas, however, require final decision by an administrator with a general overview of the needs of the entire university community. This approach will minimize the possibility of decisions based on self-interest.

The professor is interested in the quality of his institution because it is a direct reflection of his academic abilities. Therefore, his role will involve participating in and attempting to control the decisions which affect the "product" of his institution and his status as a professional. Questions of educational policy and administration such as curriculum, degree requirements, scholastic standards, evaluation of performance, and academic freedom would necessarily be within these categories since they are central to the educational program and define the professional role of the faculty member.

A primary goal in establishing the relative roles of administration and faculty should be the creation of an effective system of faculty governance by procedures and divisions of authority which will promote the most constructive exercise of the powers and abilities of each party. In systems of internal representation, such as by a faculty senate, designation of the traditional areas of authority according to whether they are

percent were characterized by administrative primacy and 25 percent by shared authority. TASK FORCE REPORT, *supra* note 4, at 16-17.

86. *Id.* at 18-19.

academic or non-academic is of less concern than if an external system of representation exists, such as a collective bargaining agent. While in both systems it is possible that academic and non-academic matters would be discussed, it is more likely that only non-academic matters would be within the university's acceptable scope of subjects for collective bargaining. The academic matters would then be decided by the administration or by an internal representative or a combination thereof, depending on the particular institution.

B. Organizational Forms for Faculty Representation

Professors in higher education have traditionally aspired to some degree of self-government both as a means to protect themselves from arbitrary actions by superiors and to enable them to participate in and formulate policies affecting themselves and the university community. At stake are issues concerning vital interests of the faculty member, including performance ratings, promotions, tenure, and other matters relating to his future marketability as a professor. Which organizational form of self-government evolves at a particular institution depends on established traditions, the activities of professional organizations, and in some cases statutory enactments. In choosing among the alternatives, it is important that a faculty member have the right to choose the type of faculty representative he deems fit. It is also important that some type of formal arrangement be established through which faculty influence may be exercised.

The general forms of organizations for faculty governance may be identified as: (1) internal representative bodies; (2) external representative bodies, either (a) professional associations or (b) collective bargaining agents.⁸⁷ These forms of organizations can be distinguished by their relationship to the formal administration of the institution, their objectives, and their tactics, although particular organizations like professional associations may assume the role of either form of the external representative body. Additionally, it should be noted that these alternative forms are not mutually exclusive, and there may be combinations of them at any particular institution. The right of faculty members, as public employees, to organize and choose a collective bargaining agent

87. *Id.* at 33. For characteristics of each model, see Rehms, *supra* note 12, at 7-9. For discussion of a European historical basis favoring the "academic model," see Williams, *supra* note 66, at 572.

from among these organizations, is now recognized in almost every state.⁸⁸

1. *Internal Representative Bodies*

Traditionally, the most common vehicle for faculty participation in campus governance has been an internal faculty agency, characterized by its integration into the institutional structure.

There are two general types of internal organizations, an academic senate and a committee system. The committee system, best suited for smaller colleges with a homogeneous faculty, has either one large committee or several standing committees which serves as a channel of communication between the faculty and administration. Members of the committees may be elected by the faculty or appointed by the administration. The committees usually are without much power and serve mainly as fact-finders and advisors.⁸⁹

The academic senate, on the other hand, is usually more dynamic and representative. At many institutions it is composed of all eligible faculty members (a majority of the institutions require a rank above instructor for eligibility) who then elect a smaller council or assembly to transact the actual business. The more common forms of senates are the academic senate, representing all faculty with academic rank, and the faculty senate, representing the teaching faculty. Either form may include or exclude administrators; however, the former "mixed senate" is more common.

Some opponents of the senate system say it can easily become undemocratic by excluding "members of the other 'party'" from powerful committees and stacking other committees with members of the faction

88. See Ferguson, *supra* note 13, at 786-89. The lone exceptions appear to be Alabama where it has been held that state public policy restricts union organization of state employees until legislative authorization is obtained. *Int'l Union of Op. Eng'rs v. Water Works Bd. of City of Birmingham*, 276 Ala. 462, 163 So. 2d 619 (1964). More recently in Iowa bargaining rights have been limited by the state supreme court holding that, in the absence of legislation to the contrary, the coercive strike remains illegal and the University of Northern Iowa, a state institution, through its board of regents can engage in collective bargaining to the extent of conferring about wages, working conditions and grievances, but cannot grant exclusive bargaining rights to any group of employees. *State Bd. of Regents v. United Packing House Workers, Local 1258*, — Iowa —, 175 N.W.2d 110, 113 (1970) (involving non-academic employees). The court concluded "... if the legislature desires to give public employees the advantages of collective bargaining in the full sense as that term is used in private industry, it should do so by specific legislation."

89. TASK FORCE REPORT, *supra* note 4, at 34.

in power.⁹⁰ Supporters acknowledge this possibility, but point out that "where there is a strong faculty senate, democratically elected and functioning as a meaningful partner in the educational enterprise, there is little need for collective bargaining."⁹¹

2. *External Representative Bodies*

(a) *Professional Associations*

By definition these organizations fall outside the institutional framework of formal campus government. Traditionally, they have concerned themselves with improving the professional status of the faculty by promoting and maintaining broad professional standards and practices to be observed by administrations and faculties alike. Occasionally, in cases involving egregious treatment of faculty members and violations of standards, they will act as pressure groups vis-à-vis the administration. In addition to these functions, they regularly publish periodicals, some containing salary schedules of other colleges and universities and material of general assistance to a faculty member in his professional role. Most often they function in conjunction with a faculty senate, providing information and assistance where needed and otherwise supplementing the senate's functions. However, in recent years some of the associations have expressed increased interest in serving as full-time faculty representatives, and increasing their role from influencing the decision-making process to participating in it.

The most active national associations for faculty members have been the American Association of University Professors (AAUP), the National Education Association (NEA), and the American Association for Higher Education (AAHE), which has an affiliation with the NEA. The respective philosophies of these associations (AAHE and NEA are treated as one) will be dealt with in subsequent sections.

(b) *Collective Bargaining Agents*

The other type of external representative is the collective bargaining agent. Primarily centered in junior colleges, bargaining agents are relatively rare for faculties of four-year colleges and universities. Evidence is mounting, however, that collective bargaining is becoming increas-

90. McConnell, *supra* note 67, at 349.

91. Brown, *supra* note 27, at 181.

ingly attractive to some university faculties.⁹² Most of the special legal obstacles regarding the right of unions and associations to bargain with public institutions, where faculty members are also public employees, have been removed by legislation.⁹³ Like the external professional associations, the bargaining agency seeks to directly participate in the decision-making process rather than merely to influence it. Often the bargaining agent's efforts culminate in a written agreement. The essential element of this model of faculty governance is the belief that a fundamental and permanent conflict of interest exists between faculty and administration.⁹⁴ Also, in the union's attempt to secure better economic benefits and conditions of employment, elements of the faculty member's employee status are emphasized rather than those of his professional status. Unions (*e.g.*, AFT) and professional associations (*e.g.*, NEA and AAUP) alike, have acted as formal bargaining agents.

3. *Views on Appropriate Organizations for Faculty Governance*

(a) *American Association of University Professors (AAUP)*

It has been said of the philosophy of the AAUP that

... few AAUP members look upon the AAUP itself as an instrument of self-government. Instead, they think of the AAUP as a means by which they can get self-government at each individual campus. The AAUP to date is primarily an interest group.⁹⁵

This association was founded in 1915 as an organization designed "to protect the academic freedom of individuals and to develop the occupation of college teaching into a profession closely modeled on medicine and law."⁹⁶ Since 1955, it has maintained programs aimed at improving salaries and strengthening job security, including the publication of yearly surveys of university and college minimum and average earnings for each rank of professor. Based on this information, each institution

92. See text accompanying notes 28-45 *supra*.

93. The exception of Alabama and the special limitations in Iowa are discussed in note 88 *supra*.

94. See generally Brown, *supra* note 27, at 168; Rehms, *supra* note 12, at 8-9.

95. Brown, *supra* note 27, at 173. It was also noted that about 30 percent of the professors eligible for AAUP membership are members. This totals approximately 90,000 members in 1150 chapters. See Brown, *supra* note 18, at 1070 n. 11.

96. Metzger, *Origins of the Association*, 51 AAUP BULL. 229, 232, 233 (1965). It should be stated that the AAUP has achieved notable success in protecting faculty members in the area of academic freedom.

is graded from AA to F in terms of the AAUP's previously announced standards.

In recent years, a debate has developed between two factions of the AAUP. There are those who wish it to continue as primarily a professional organization, and others who wish it to be a militant organization working for economic objectives.⁹⁷ It would seem that the recent AAUP objectives reflect a compromise between the two positions. In 1968, in an official policy statement, the AAUP stated as its current objectives: the promotion of "economic and other interests of the faculty, . . . full participation by all faculty members, [guarantee] of academic freedom and tenure, [creation of grievance procedures, and non-support of a] strike or other work stoppage, *except in extraordinary circumstances*."⁹⁸

To accomplish these objectives the AAUP has traditionally favored the faculty senate form of governance, viewing the industrial relations approach as inappropriate.

Faculty members, in decisions relating to the protection of their . . . interests should participate through structures of self-government within the institution, with the faculty participating either directly or through faculty-elected councils or senates. As integral parts of the institutions such councils or senates can effectively represent the faculty without taking on the adversary and sometimes arbitrary attitude of an outside representative.⁹⁹

However, the association has clearly stated that when a faculty is considering representation through an outside organization the AAUP chapter may compete with it to represent that faculty.¹⁰⁰ It is submitted that this statement is the AAUP's public announcement that it will soon be competing with the NEA and AFT.

97. The groups favoring strictly professional objectives are said to be from "older better established institutions . . . [which] are generally well off;" whereas, the more militant faction are said to be from newer institutions of lesser renown. See Brown, *supra* note 27, at 171.

98. *Policy on Representation of Economic Interests*, 54 AAUP BULL. 152, 154 (1968) (emphasis added). "Extraordinary circumstances" are defined as flagrant violations of academic freedom or government. *Proposed Statement on Strikes*, *id.* at 157.

99. *Policy on Representation of Economic Interests*, *supra* note 98, at 152-53.

100. *Id.* A local chapter of the AAUP had evidently anticipated this "go ahead," because a year earlier it had become the recognized bargaining agent for the faculty at Junior College District No. 522, Bellville, Illinois. Ferguson, *supra* note 13, at 801. For other colleges where the AAUP has been designated as a collective bargaining agent, see note 32 *supra*.

(b) *National Education Association (NEA)*¹⁰¹

The NEA was founded in 1957 to "elevate the character and advance the interests of the profession of teaching, and . . . promote the cause of popular education in the United States."¹⁰² Toward that end, it has traditionally represented elementary and secondary school teachers, and administrators. In 1968, it claimed a membership of nearly fifty-two percent of the teachers, or over one million persons, with an additional 600,000 teachers and administrators affiliated with state associations.¹⁰³ By that same year, it also claimed to represent eight junior college faculties, having negotiated written agreements with three of them.¹⁰⁴

It is interesting to note the increasing militancy of the NEA's policies regarding its role in the relationship of faculties to school administrations.¹⁰⁵ Prior to 1960, the NEA had made no mention of bargaining, sanctions, or strikes. In that year, however, the NEA's board of directors adopted a resolution on representative negotiations suggesting that affiliate chapters could properly discuss conditions of employment with the school administration.¹⁰⁶ In 1961, the NEA stated that professional education associations should participate with school boards in determining "policies of common concern, including salary. . . ." ¹⁰⁷ The year 1962 represented a turning point for the NEA. It resolved to support professional negotiations and to insist upon the right of professional associations to participate in determining policies and to join in establish-

101. The NEA has various affiliates throughout the nation. Affiliates of the NEA in Michigan and their members are as follows: The Michigan Association for Higher Education (MAHE) is an association of persons who are faculty members on community college and four-year college and university campuses and in graduate and professional schools in Michigan. It is a department of the Michigan Education Association, a statewide association of more than 70,000 members in elementary, secondary, and higher education. MAHE is affiliated with the American Association for Higher Education (AAHE), a nationwide organization of faculty members in higher education. AAHE is a department of the million member National Education Association, a nationwide association of persons in elementary, secondary and higher education. See *Serving Higher Education Faculties*, MICH. EDUC. J. 21 (October, 1967). This information is also based on an interview with Charles Belknap, *supra* note 14.

102. E. WESLEY, *THE NEA: THE FIRST HUNDRED YEARS* 1 (1957).

103. NEA Assembly, Press Release, July, 1968; see also Glass, *Work Stoppages and Teachers: History and Prospect*, 90 MONTHLY LAB. REV. 43 (Aug. 1967).

104. Ferguson, *supra* note 13, at 800.

105. For a detailed analysis of the evolution of the NEA's policies see Muir, *supra* note 7.

106. NATIONAL EDUCATION ASSOCIATION, ADDRESSES AND PROCEEDINGS 154 (1960).

107. NATIONAL EDUCATION ASSOCIATION, ADDRESSES AND PROCEEDINGS 216 (1961).

ing procedures to "reach mutually satisfactory agreements."¹⁰⁸ It stated that

[t]he teacher's situation is completely unlike that of an industrial employee. . . . Industrial disputes conciliation machinery, which assumes a conflict of interest and a diversity of purpose between persons and groups, is not appropriate to professional negotiations in education.¹⁰⁹

It also asserted, however, that professional sanctions should be invoked as a means to prevent arbitrary policies or practices by administrations.¹¹⁰

In 1963, NEA added that negotiation procedures must be established, and in 1964 it agreed that NEA affiliates could use machinery, such as state mediation and arbitration boards, originally designed for settling industrial disputes.¹¹¹

It should be noted that in 1964 the AFT was very active in recruiting new members, which caused great concern within the NEA and stimulated its changing attitude toward collective bargaining. In 1965, it was resolved that members who ignored Association-imposed sanctions were subject to expulsion;¹¹² and, in 1966, the Assembly sought the establishment of professional grievance procedures.¹¹³ In 1967, the NEA's board of directors, although not endorsing strike action, agreed to support affiliates once a strike had occurred.¹¹⁴ The Assembly endorsed this policy the following year and called upon its affiliates to seek the repeal of state laws that prohibited the withdrawal of services.¹¹⁵ This area contains a basic difference of philosophy between the NEA and the AFT.¹¹⁶ The NEA opposes any statutory scheme which may tend to cause loss of the teaching profession's identity as a profession. The AFT,

108. NATIONAL EDUCATION ASSOCIATION, ADDRESSES AND PROCEEDINGS 174-75 (1962).

109. *Id.* at 398.

110. *Id.*

111. NATIONAL EDUCATION ASSOCIATION, ADDRESSES AND PROCEEDINGS 237 (1963); NATIONAL EDUCATION ASSOCIATION, ADDRESSES AND PROCEEDINGS 22 (1964).

112. NATIONAL EDUCATION ASSOCIATION, ADDRESSES AND PROCEEDINGS 223 (1965).

113. NATIONAL EDUCATION ASSOCIATION, ADDRESSES AND PROCEEDINGS 473 (1966).

114. *Resolution on Impasse in Negotiation Situation—Passed by NEA Board of Directors*, July 1, 1967, NEA J. 38 (October 1967).

115. NEA RESOLUTIONS COMMITTEE, REPORT ON THE PLATFORM AND RESOLUTIONS 15 (1968). What the Association may have in mind for the future can be anticipated by its president's request in 1968 for a \$10 per year increase in membership fees to be earmarked for the establishment of a defense fund. Muir, *supra* note 7, at 624.

116. For a general discussion of NEA and AFT views, see R. DOHERTY & W. OBERER, *supra* note 59, at 22-44; M. MOSKOW, TEACHERS AND UNIONS 93-114 (1966).

on the other hand, holds that there is no reason for distinguishing teachers from other public employees because teachers, unlike lawyers or doctors, perform their professional functions almost solely as employees.¹¹⁷ Although this metamorphosis of the NEA's position related primarily to the secondary and elementary situation, the applicability to higher education is evident. It therefore appears that the NEA has joined those who favor collective bargaining as the most appropriate form for faculty governance. If the AFT has persuaded the NEA to change its position on bargaining, sanctions, and strikes, and caused it to seek protective legislation and exclusive bargaining rights, then the observation that union rivalry is one of the important "sources of vitality in the American labor movement" would seem correct, and would suggest that such rivalry will continue.¹¹⁸

(c) *American Federation of Teachers (AFT)*

Organized in 1916, the AFT immediately affiliated with the American Federation of Labor and has since followed the general pattern of American unionism as embodied in the National Labor Relations Act. "[I]t asserts that designating an organization independent of the institution as the exclusive representative of all professional employees of the institution is normal and inevitable. It accepts a management-employee relationship between . . . administrations . . . and faculties . . .," and through collective bargaining it expects to achieve uniform conditions of employment, thereby, in its opinion, enhancing the prospect of increased salaries and decreased work loads.¹¹⁹ Dr. Israel Kugler, as President of the United Federation of College Teachers (an affiliate of AFT), explained the union's view of present institutions and their internal systems of faculty governance.

The board of directors is a board of trustees; the managers are the presidents and the host of deans. It is these groups that wield the power and authority and determine the destiny of a university. To be sure, they have woven a web of faculty senates and councils which simulate the original role of policy-making that university faculties once had. The advisory nature of these bodies provides them with some active role in curriculum and student affairs, but

117. Brown, *supra* note 27, at 174.

118. See generally G. BROOKS, *THE SOURCES OF VITALITY IN THE AMERICAN LABOR MOVEMENT* (1960).

119. Brown, *supra* note 18, at 1069.

virtually no part to play in securing the necessary finances to provide professional salaries, work load, and working conditions.¹²⁰

(d) *Task Force Report*¹²¹

This report is comprehensive in its treatment of the alternative methods of faculty governance used throughout the nation's campuses, and it is therefore important to note its analyses. In 1966, the Task Force was convened to "examine factors contributing to faculty unrest and recommend procedures for improving faculty participation in campus government."¹²² The report was based on intensive field investigations wherein thirty-four separate institutions in different parts of the country were visited, including twenty-eight public and six private colleges and universities. The public institutions included twelve junior or community colleges, seven municipal or state colleges, seven institutions that recently had attained university status, and two long-established universities.¹²³

The main source of faculty discontent was found to be the desire of faculty members to participate more fully in the determination of policies affecting their status and performance.¹²⁴ It added that shared authority was the desired concept for an effective system of campus governance and was best implemented through the establishment of an internal organization, preferably an academic senate composed of faculty and administrative personnel, rather than by the utilization of external agencies such as professional associations or bargaining agencies.¹²⁵ It viewed external professional associations as possibly constructive complements to the academic senate, in that they could provide

120. Kugler, *supra* note 69, at 350. For a detailed and authoritative summary of AFT positions in higher education, see Kugler, *The Union Speaks for Itself*, 49 *EDUC. REC.* 414 (1968).

121. Although the AAHE, an affiliate of NEA, funded this report, the authors, all professors, state that their work "was carried out without any preconditions or biases other than those imposed by the members of the Task Force . . . and this report presents the judgments of the Task Force alone and not of the sponsoring agency." TASK FORCE REPORT, *supra* note 4, at v.

122. *Id.* at 6.

123. *Id.* The institutions studied in Michigan were the University of Michigan, Central Michigan University, Wayne State University, Michigan State University and Henry Ford Community College. Based upon an interview with one of the authors of the *Task Force Report*, Professor Charles Rehmus, Co-Director of the Institute of Labor and Industrial Relations at the University of Michigan.

124. TASK FORCE REPORT, *supra* note 4, at 1.

125. *Id.* at 2.

information and technical services to the faculty and support educational sanctions should they become necessary.¹²⁶ On the issue of strikes the report stated: "Although strikes are generally undesirable in institutions of higher education, under certain circumstances they may be a less destructive alternative than other sanctions."¹²⁷

4. *Professional Associations and Collective Bargaining Agencies Compared*

(a) *General Comparison*

Naturally, a professional association by not seeking to bargain collectively for a faculty can maintain that descriptive status. The question has arisen in recent years whether these associations have been desirous of retaining that status or, whether they have been seeking (or are likely to seek in the future) to bargain collectively for faculties. If, in fact, there is no substantive difference in present approaches, then it is submitted that the choice facing faculties is simply between an internal organization such as a senate or a single type of external organization following the industrial relations model.¹²⁸ Since the AFT characterizes itself as a union, the inquiry below mainly concerns the NEA (and its affiliates)¹²⁹ and the AAUP.

The AAUP has been taking an increasingly militant stance in the area of faculty governance, especially regarding the right of faculty to use the strike sanction. For the present time at least, it has apparently limited the utilization of a strike to academic rather than economic matters, and it has carefully couched every militant position in terms of preference for restraint and exhaustion of internal remedies.¹³⁰ Additionally, with a few exceptions,¹³¹ it has not actively sought to represent faculties for purposes of collective bargaining culminating in written agreements, although it admittedly stands ready to do so.¹³² It is very possible that it may soon be engaging in these types of activities, but it has not yet

126. The *Report* added: "a more perceptive view of the emergence of bargaining agencies on the campus is that they provide dramatic evidence of the institution's failure to develop satisfactory alternatives for faculty representation." *Id.* at 44-45.

127. *Id.* at 4.

128. This assumes that a faculty senate does not attempt to qualify as a labor organization (discussed in a subsequent section).

129. Affiliates of the NEA such as the AAHE are treated as one.

130. See generally *Proposed Statement on Strikes*, *supra* note 98, at 157.

131. See notes 37 and 42 *supra*.

132. *Faculty Participation in Strikes*, 54 AAUP BULL. 154 (1968).

devoted its energies toward that end. That the AAUP, when designated as a bargaining agent, would not take a trade union approach but would rather use that position as a means to strengthen internal organizations is suggested by the following observation.

[A]n administration and a bargaining representative who were of like minds on principles of shared power could contract, within the expansive limits of the phrase "terms and conditions of employment," to withdraw all sorts of academic issues from unilateral control of either administration or bargaining representative, and to reserve them for prescribed internal procedures with full faculty participation.¹³³

In this way, it is suggested, the ideals of academic government could become the beneficiaries of collective bargaining agreements which might otherwise threaten them. Although it is too early to predict which course the AAUP will take, it is still primarily a professional organization. But, it is certain that the AAUP is watching the organizational activities of the NEA and AFT as they add to their membership and obtain exclusive rights of representation.

Questions have also been raised whether the NEA and its affiliates are more accurately called professional associations or labor organizations. It has been said of the NEA that there is very little difference between it and AFT.¹³⁴

. . . NEA affiliates are beginning to act very much like trade unions. Indeed, when an NEA affiliate participates in a representation election, wins the election and assumes the role of exclusive bargaining agent, enters into negotiations with the employer over a comprehensive agreement, goes out on strike when its terms are not met, wins the strike and administers the agreement with vigor and determination—when an affiliate does all this, it does not seem right to speak of it as anything but a union. . . . The struggle then seems to have become not a contest between rival ideologies, between "professionalism" and "trade unionism," but between rival unions, reminiscent of jurisdictional fights in private employment. . . .¹³⁵

133. Brown, *supra* note 18, at 1078-79. It should be noted that Professor Brown stated this position as President of the AAUP.

134. Brown, *supra* note 27, at 174.

135. R. DOHERTY & W. OBERER, *supra* note 59, at 41.

Another author suggests that "professional associations in the teaching professions are already unions in all but name; although educational associations cling desperately to clichés of the past when defining terms in the delicate area of collective bargaining."¹³⁶

(b) *Connotative and Legal Comparison*

Using *Webster's Dictionary* to define the terms "professional association," and "trade union," one finds a distinct difference. The question remains, however, as to the legal difference when placed in the context of a collective bargaining agent.¹³⁷

State and federal legislation often similarly define "collective bargaining" as

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or make a concession.¹³⁸

The term "collective bargaining agent" embodies the concept of exclusive representative which in its application precludes an employer from negotiating with individual employees and, in general, dealing in any way except through the representative.¹³⁹

Neither the word "professional" nor "union" is used in state legislation; rather the federal definition of the term "labor organization" is fol-

136. Marmion, *supra* note 18, at 41.

137. Address by William Lemmer, Attorney for University of Michigan, *A Professional Society or a Trade Union as a Collective Bargaining Agent, What's the Difference?*, Feb. 28, 1970 (unpublished).

138. The statute is applicable to public employees. Act 379, [1965], Public Employment Relations Act (PERA), MICH. STAT. ANN. § 17.455 (15) (1968) (words "ordinance or resolution" follow contract). Applicable federal law is found in the National Labor Relations Act, 29 U.S.C. § 158(d) (1964).

139. Public Employment Relations Act, MICH. STAT. ANN. § 17.455 (11) (1968), which provides that individuals may present grievances to the employer for adjustment, if such adjustment is not inconsistent with the terms of the collective bargaining agreement and the bargaining representative has been given an opportunity to be present at such adjustment.

lowed.¹⁴⁰ While Michigan's law governing public employees does not define labor organization, its administering agency, the Michigan Employment Relations Commission (MERC), in its decisions involving public employees has uniformly adopted the federal law's definition. By case interpretation, it has been defined as "an organization existing for the purpose of organizing employees in anticipation of representing employees, in which employees participate . . .,"¹⁴¹ and "even though it may have an informal structure, a committee existing for the purpose of dealing with the employer concerning wages, hours and working conditions is a labor organization."¹⁴² It is apparent that regardless of the title of the organization, it is still a "labor organization" when it seeks to engage in collective bargaining.

In summary, regardless which organizational form for faculty governance is selected, freedom of choice in that decision is possible only by awareness of the alternatives, the views of the various organizations, and the actual or imagined differences between them. This discussion has attempted to provide that information.

C. Methods of Dispute Settlement

1. Alternative Approaches of Decision-Making

Disagreements inevitably arise between an administration and its faculty; how these disagreements are viewed often governs the type of approach used to resolve the dispute. If a faculty views a dispute as a problem to be solved within a framework of common goals, an appeal to reason can be used in the context of institutionally established appeal or grievance procedures.¹⁴³ The potential for confrontation will be diminished with the emphasis placed on persuasion as a means to achieve objectives. If, on the other hand, a faculty views a dispute as a conflict, which assumes the existence of an adversary relationship, then greater emphasis will be placed on coercion and power as means to elicit favorable responses to demands.

Since collective bargaining is a recent development on college campuses, many of the alternatives discussed below have been formulated for

140. See, e.g., MICH. STAT. ANN. § 17.454 (2) (g) (1968); National Labor Relations Act, 29 U.S.C. § 152(5) (1964).

141. Harper Hospital, 1969 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 243.

142. Wayne State University, 1969 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 670.

143. This envisions a system separate from one which is run entirely by a university administration.

public employees generally. There is no reason to believe that college faculty members will be treated differently from other public employees in the immediate future; therefore, analogies will be made from current public employee law concepts. There are three alternative approaches to decision-making in dispute settlement: (a) persuasion; (b) institutional procedures using neutral third-parties; and (c) coercion, including sanctions and strikes. The first approach is used most often, but when disputes persist resort must be made to the second approach. If this alternative is not available, the faculty is faced with the unhappy choice of subordinating its position to the administration or using the alternatives suggested in the third approach.

(a) Persuasion (Informal Dispute Settlement)

This is an informal approach involving appeals to reason and the exchange of information, based on the concept of shared authority between administration officials and faculty, where each tries to influence a change in the other's attitude or position. Since professors are the teachers of reason and logic, it is appropriate, as well as traditional, that in resolving disputes they employ persuasive techniques appealing to reason based on the presentation of facts. This approach provides each side with sufficient facts so that each could contribute to the decision, even though one party or the other may assume the major burden of decision-making. With information freely shared at an early stage in the decision-making process, premature solidification of positions based on supposition rather than fact can be minimized, if not avoided. If persuasion cannot prevail, however, resort to alternative approaches embodying formal arrangements for dispute settlement, may be necessary.

(b) Institutionally Established Procedures Using Neutral Third-Parties

Institutionally established procedures on campuses without collective bargaining agents may include mediation, fact finding, or arbitration as techniques to avoid or break an impasse. These procedures will commonly be available only to resolve issues which have a special relevance for individual faculty members, such as promotion and tenure, rather than be available to the faculty as a whole on issues such as educational policies. Of course, resolution of issues involving individuals very often achieves the same result as if an issue affecting the faculty as a whole had been decided.

It has been said of grievance procedures in higher education:

This is one of the major contributions of the American union movement to working life. It brings important elements of due process into the employment relationship. . . . Most important, however, the keystone of the grievance process is the possibility of review of administrative decisions by qualified and independent neutrals.¹⁴⁴

Unfortunately, the keystone of the process, review of administrative decisions by neutrals, is often not present within a university appeal procedure except in an advisory function. More often than not, administration officials are unable or do not wish to relinquish their ultimate decision-making powers to an outsider regardless of his neutrality.¹⁴⁵ Part of this hesitancy by university administrations is based on opinions that it would constitute an unconstitutional delegation of authority¹⁴⁶ and that serious bargaining would be inhibited by knowledge that an arbitrator would likely make the final decision. Thus, where the administration chooses not to submit a dispute to a neutral third-party, and where the grievant has exhausted his institutionally established procedures, the possibility must be recognized that methods of coercion may be used. These methods include the strike.

If strikes are found to be personally or legally inappropriate in the academic setting or just not compatible with the desired goal of an amicable negotiated settlement, then alternatives are needed. There is some evidence in this country that alternative dispute resolution procedures, including mediation, fact-finding, and arbitration, have been

144. Rehmus, *supra* note 12, at 12.

145. TASK FORCE REPORT, *supra* note 4, at 54 reported in its study that several institutions had formal grievance procedures in operation. None of these procedures provided for arbitration by an outside third-party, but in one large university, disputes over individual issues could be referred for final determination to an internal panel comprised of an equal number of administrators and faculty members. However, in 1968 the Legislative Conference negotiated an agreement with City University of New York calling for binding arbitration by a neutral third-party.

146. See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.10 (1958). Most often such a delegation must be authorized by statute where it is not pursuant to a collective bargaining agreement. The statute must have unambiguous standards; see, e.g., MICH. COMP. LAWS ANN. § 423.239 (Supp. 1970); even then there are often statutory limits to the arbitrator's ability to grant awards. See generally Rehmus, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919 (1969); Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 279-89 (1969).

sufficient to induce settlements in many situations involving public employees.¹⁴⁷ Accordingly, it would be useful to examine these procedures to the extent that they might be utilized on the college campuses with or without a collective bargaining agent.

(1) *Mediation*

Mediation is designed to promote settlements by introducing a third party into the dispute who acts passively in helping the parties agree on their own solutions. This could be used as a persuasive technique in colleges, and could easily be incorporated into an existing grievance procedure. Professional associations such as the AAUP have rendered this service on an ad hoc basis, usually in cases involving academic freedom. Some states, like Michigan, make formal mediation services available (including use of general labor mediators) upon request of either party to resolve disputes relating to a collective bargaining agreement.¹⁴⁸

(2) *Fact-Finding*

Fact-finding as a technique is gaining widespread acceptance in public employee disputes and suggests a very viable possibility for use by faculties in higher education.¹⁴⁹ After an impasse is reached, this procedure utilizes a neutral third-party to make a thorough investigation, present the facts to both sides, and encourage the parties to engage in responsible scrutiny of their respective positions. Fact-finders may or may not give recommendations; if they do, and one party refuses to follow them, then the other party can make the findings public in an attempt to influence the recalcitrant party.¹⁵⁰ In this way, the fact-finder can prevent either party from abusing its bargaining power. The fact-finding method, however, is somewhat limited, because the entire process is

147. J. BELASCO, *PUBLIC EMPLOYEE DISPUTE SETTLEMENT* (1966); Stern, *Wisconsin Fact-Finding Procedure*, 20 IND. & LAB. REV. 1 (1966); Comment, *supra* note 146, at 275-88.

148. See MICH. COMP. LAWS ANN. §§ 423.207, 423.25 (1967).

149. For example in Massachusetts, of 200 public employee cases submitted to fact finders, 140 were resolved prior to recommendations. In Michigan 56 percent were resolved prior to recommendations. See Gov't EMPLOYEE REL. REP. B-3, No. 283 (Feb. 10, 1969). Of course, these proceedings involved disputes relating to collective bargaining agreements, but a similar procedure could be developed within a university's institutional procedures. See Smith, *supra* note 77, at 898.

150. For contract disputes, this is the method used in Michigan and New York. See MICH. COMP. LAWS ANN. § 423.25 (1967); N.Y. CIV. SERV. LAW § 209-3(c) (McKinney Supp. 1968).

based upon persuasion and voluntary agreement rather than adjudication.¹⁵¹

(3) *Arbitration*

Since fact-finding does not guarantee the dissolution of a bargaining impasse, some authors argue that it is not effective, and recommend the use of binding arbitration as the only effective alternative to the strike.¹⁵² This argument is usually advanced citing the following premises: (1) collective bargaining is desirable; (2) strikes are undesirable; (3) the only way to avoid strikes is to provide a substitute; and (4) the most effective substitute is binding arbitration.¹⁵³ Most states have accepted the first two premises and are now beginning to experiment with variations of the latter two, emphasizing voluntary procedures.

Arbitration may be statutorily compulsory, or it may be voluntarily entered into by mutual agreement of the parties. The procedure provides that a neutral third party will resolve disputes by deciding the issues. Compulsory arbitration, despite its occasional attractiveness to the public, is seldom used, except in the case of certain critical employees such as firemen or policemen.¹⁵⁴ Since teachers or college professors have not been placed in that category, only voluntary arbitration is discussed.

Voluntary arbitration, which may be advisory or binding,¹⁵⁵ also is not extensively used by public employers.¹⁵⁶ It may include two general

151. Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 967 (1969).

152. R. DOHERTY & W. OBERER, *supra* note 59, at 104; Note, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129 (1968).

153. R. DOHERTY & W. OBERER, *supra* note 59, at 104.

154. *E.g.*, Mich. Pub. L. No. 312 of the Public Acts of 1969 (authorizing binding arbitration of unresolved collective bargaining disputes involving police and firemen); PA. STAT. tit. 43, § 217.7 (Supp. 1970); R.I. GEN. LAWS ANN. § 28-9.1-9 (1968) (firemen); WYO. STAT. ANN. §§ 27-265 to 27-276 (1957). Other "critical employees" include public transportation workers, LA. REV. STAT. ANN. § 23:890(E) (Supp. 1970); PA. STAT. tit. 55, § 563.2 (1964) (toll bridges and toll roads); public utility workers, NEB. REV. STAT. §§ 48, 801-23 (1968), and hospital employees, MINN. STAT. ANN. § 179.36 (1966) *constitutionally upheld in* Fairview Hosp. Ass'n v. Public Bldg. Serv. & Hosp. Inst. Emp., Local 113, 241 Minn. 523, 64 N.W.2d 16 (1954), *noted in* 39 MINN. L. REV. 322 (1955) and *discussed in* Note, *supra* note 152, at 139-40.

155. In effect, advisory arbitration is fact finding, *see* ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1970-71), just as fact finding which is binding is actually arbitration.

156. ALAS. STAT. § 23.40-010 (1959); ILL. REV. STAT. ch. 111 2/3, § 301 (1960); NEB. REV. STAT. §§ 48-801 to -823 (1968); N.J. STAT. ANN. § 34.13(A)-7 (1965); N.Y. CIV. SERV. LAW § 207 (McKinney Supp. 1968).

types of arbitration: (1) "interests" arbitration, which decides the substantive terms of a new contract, thereby resolving a bargaining impasse; and (2) "grievance" arbitration, which settles disputes over the interpretation of an existing contract.¹⁵⁷ Only grievance arbitration is discussed, because it is doubtful that college and university administrators will relinquish or otherwise delegate their contractual powers (assuming they can) to a neutral third-party without the existence of some type of agreement which limits the scope of the arbitration.¹⁵⁸ Although it has been estimated that ninety-five percent of all union contracts negotiated in private industry contain provisions for arbitration of either grievances or interpretations of the contract,¹⁵⁹ relatively few of these provisions exist in public employment.¹⁶⁰ In teachers' contracts, however, despite claims and predictions of illegality, binding arbitration by a neutral third-party is becoming increasingly common.¹⁶¹ A recent administrative decision in Michigan held that since the state had comprehensive bargaining laws imposing a duty to bargain on public employers, binding arbitration as the last step in a grievance procedure was a mandatory subject of bargain.¹⁶²

At the university level, since 1968 the University of Michigan has had collective bargaining agreements with three unions representing non-academic employees. Each contract contains provisions calling for binding arbitration as the final step in the grievance procedure.¹⁶³ The

157. Comment, *supra* note 146, at 279-80.

158. Thus far the agreements have been collective bargaining agreements, but it is conceivable that accord could be reached on a joint university-faculty grievance procedure without collective bargaining.

159. C. SCHMIDT, JR., H. PARKER & B. REPAS, *A GUIDE TO COLLECTIVE NEGOTIATIONS IN EDUCATION* 70 (1967).

160. See *Gov't EMPLOYEE REL. REP.* A-1, A-2, No. 183 (Mar. 13, 1967).

161. Early court decisions held that arbitration of grievances by governmental employers was an unlawful delegation of power, *e.g.*, *Mugford v. Mayor and City Council*, 185 Md. 266, 44 A.2d 745 (1945); however, this began to change in 1951 when the court in *Norwalk Teacher's Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951) held that specified grievances could be considered.

162. *Oakland County Sheriff's Dept. v. Local 23, AFSCME*, No. C-66, F-63 (Mich. Lab. Mediation Bd.) reprinted in *Gov't EMPLOYEE REL. REP.* F-1, No. 227 (January 8, 1968). Other cases involving similar holdings are *Local 953, AFSCME v. Benton Harbor School Dist.*, Civil No. 6229(B) (Mich. Cir. Ct. for Berrien County, Oct. 12, 1967) reprinted in *Gov't EMPLOYEE REL. REP.* E-1, No. 216 (Oct. 30, 1967). Some state statutes specifically allow grievance arbitration, *e.g.*, Mo. ANN. STAT. § 290.350 (1965); MASS. ANN. LAWS ch. 149, § 178K (Supp. 1968). See also Note, *Labor Law—Public Employment—Arbitration and Agency Shops As Mandatory Subjects of Bargaining*, 14 WAYNE L. REV. 1238 (1968).

163. Address by William Lemmer, University of Michigan Attorney, *Arbitration, Use,*

University Attorney has evaluated the effectiveness of arbitration under a collective bargaining agreement at the University:

It is difficult for a union to justify a work stoppage when arbitration is available. . . . Not many [grievances] are taken to arbitration, because our answers, based on application of our agreement, *are* usually correct.

Consequently, I believe that arbitration is the best available practical method for resolving disputes during the life of a collective bargaining agreement. In addition, it provides the psychological value of having an outsider available to tell us who's right when we act in a way the union thinks violates our contracts.¹⁶⁴

Thus, arbitration may be the method selected by many universities as their institutional procedure for final dispute settlement should a collective bargaining relationship develop.¹⁶⁵

(c) *Coercion*

If none of the described approaches has resulted in a satisfactory resolution of the dispute, resort is often made to the use of coercion. Whereas the user of persuasion seeks to influence the result, perhaps modifying his own views in the process, the user of coercion seeks to force the other party, by use of varying degrees of power, to submit to his terms. In a labor relations context on college campuses, methods of coercion may vary in degree from sanctions to academic strikes.

(1) *Sanctions*

Sanctions might arguably fit under the persuasion approach; however it has been said of sanctions, that when used adroitly they can prove

Value and Precautions In Institutional Labor Contracts, National Association of College and University Attorneys, June 17, 1970 (unpublished). Mr. Lemmer noted that from 1968 to June, 1970, two unions, the Operating Engineers and the Trades Council, representing small bargaining units (no figures given) filed fourteen grievances; whereas the larger union AFSCME filed 900 grievances, twenty-four of which were scheduled for arbitration.

164. *Id.* Mr. Lemmer limits these remarks to "collective bargaining agreements." Rhode Island has passed a law permitting binding arbitration on teachers and the school board, solely for a limited range of issues, "not involving expenditures of money." R.I. GEN. LAWS ANN. §§ 28-9.4(11) to -13 (1968).

165. This is the case at City University of New York where its agreement with the Legislative Conference contains such a provision.

to be a far more devastating weapon than the strike.¹⁶⁶ Therefore, realizing their ambivalent nature, they are discussed under the heading of coercion.

The object of using sanctions is to hurt the other side to such an extent that its position will be changed. The types of sanctions fall into three general categories: political, educational, and economic.

Political sanctions rely on the use of the political process to bring about the resolution of issues, for example, by sending faculty delegations to the legislature or governor to petition for a particular cause on which the administration will not alter its view. This method, however, is cumbersome for resolution of particular disputes at a campus and better lends itself to broader problems arising at the legislative level.

Educational sanctions are frontal attacks on the institution or the administration's professional standing. It may take the form of censure by the faculty or by an external organization such as the AAUP,¹⁶⁷ which can have the effect of an employment boycott.¹⁶⁸ One commentator assessed the AAUP's method of censure as follows:

This censure is in fact AAUP's most potent weapon. By publicly denouncing the institution, and relating the facts and circumstances surrounding the serious breach of academic freedom, the association seeks to marshall the forces of public opinion.¹⁶⁹

Another sanction with far-reaching consequences is an attack on the accreditation of an institution. This is accomplished by petitioning ap-

166. Neiryneck, *supra* note 5, at 303.

167. As of March, 1970, a total of 23 colleges and universities were censured by AAUP for violating its standards on academic freedom and tenure. 56 AAUP BULL. 3 (March, 1970).

168. Ferguson, *supra* note 13, at 795. An external organization may also exercise sanctions on its members, for example, by expelling a member who violates the organization's sanctions against a particular university. See generally M. Moskow, *supra* note 116, at 200; and regarding the NEA, see Neiryneck, *supra* note 5, at 302-04. See also note 172 *infra*.

169. Brown, *supra* note 27, at 169. For a detailed analysis of the AAUP's censure of St. John's University (N.Y.), see *College and University Government: St. John's University (N.Y.)*, 54 AAUP BULL. 325 (1968). An extraordinary measure of censure was levied by the AAUP when it took the position that "it would be inappropriate for our members to accept appointments at St. John's University." 55 AAUP BULL. 308 (1969). A distinct disadvantage of the AAUP's use of censure is the time lapse between the time the Association is asked to intervene and the time it publishes its report, which is about two years. Brown, *supra* note 27, at 169.

appropriate authorities to revoke the institution's accredited standing.¹⁷⁰ Because of the relative ease with which censures or petitions for withdrawal of accreditation may be initiated and the fact that such actions will often cause most administrators to re-examine their position, educational sanctions have had broad appeal.¹⁷¹

Economic sanctions are measures taken by a faculty which are used to impair the ability of an institution to use or attract resources necessary for effective operation. These measures are designed to cause the institution to limit the use of its facilities or otherwise lose revenues, thus bringing about an adverse economic impact on the university. Such sanctions include publicizing disputes which are unfavorable to the administration, encouraging student boycotts, refusing to accept extra-curricular responsibilities, or the withholding of services either by means of a strike or by one of its more colorful variations, professional study days, mass sick days, slow downs, etc. Naturally, the application of any given measure will depend on the goal to be attained and the amount of pressure necessary to achieve it. The techniques described above are merely illustrations and are limited only by the powers of imagination.

(2) *The Academic Strike and Its Propriety as Viewed by External Representative Organizations*

The ultimate economic sanction that faculty members can impose is, of course, the strike, often euphemistically referred to as "withholding of services." Although strikes have not traditionally been used by faculties in higher education, under some circumstances their use has been sanctioned by every external organization seeking to represent university faculties. There is no reason to believe that present anti-strike legislation will inhibit college and university faculties any more than it has other public employees. In recent years there has been an increasing number of strikes by college and university faculties over both academic and non-academic subjects.¹⁷² Some view this as a shift from professorial commitment to a competitive power play which damages a faculty member's professional status.¹⁷³ Regardless of how it is viewed, it is

170. A possible problem of seeking withdrawal of accreditation is that, if granted, it may persist beyond the life of the problem which caused it.

171. TASK FORCE REPORT, *supra* note 4, at 49.

172. See Ferguson, *supra* note 13, at 804.

173. Kadish, *supra* note 54, at 164.

evident that notions of professionalism, academic freedom, and all those factors which are weighed in a professor's decision when selecting a type of organization to represent his interests will be considered in determining whether it is appropriate for a faculty member to strike.

The several external representative organizations have expressed their views on the propriety of the academic strike. The AAUP, in 1968, after years of decrying the inappropriateness of the strike, announced in a policy statement that although it believes the strike is an inappropriate mechanism for the resolution of most conflicts within higher education, it does not follow that the strike should never be used. For example,

situations may arise affecting a college or university which so flagrantly violate academic freedom (of students as well as faculty) or the principles of academic government . . . that faculty members may feel impelled to express their condemnation by withholding their services either individually or in concert with others.¹⁷⁴

Further, the AAUP says that "a strike is clearly inappropriate when it does not have positive educational objectives," for example, a strike in support of college service employees or a strike to dramatize some national or international political position.¹⁷⁵ These types of strikes "could not be countenanced by a professional organization like this Association."¹⁷⁶ Additionally, the AAUP has stated that it emphatically rejects "the industrial pattern which holds the strike in routine reserve for use whenever economic negotiations reach an impasse."¹⁷⁷ It would seem then, that the AAUP would likely recommend strike action only over academic rather than economic issues.

The NEA has stated that while it does not recommend that its affiliates strike, "strikes have occurred and may occur in the future" in which case the Association "will offer all of the services at its command to the affiliate concerned to help resolve the impasse."¹⁷⁸ It does not distinguish between academic and non-academic issues.

The AFT's position on strikes has consistently been that faculties should have the full rights accorded to private sector employees, includ-

174. *Policy on Representation of Economic Interests*, *supra* note 98, at 157.

175. *Id.* at 158.

176. *Id.*

177. *Id.*

178. Muir, *supra* note 7, at 624.

ing the right to strike.¹⁷⁹ Collective bargaining is viewed as ineffective without the strike or the threat of a strike, and either will be used without hesitation when the situation demands it.

From its study the Task Force concluded that higher education is not so essential that society would be threatened by its temporary cessation. Additionally, suppression of strikes would be more destructive to the institution in the long run than a strike, itself. Therefore, it adds,

... there are no decisive reasons why the faculty should be denied the opportunity to strike. . . . If the administration has denied the faculty the right to participate effectively in campus decision-making, then it must accept a major share of the responsibility when a strike ensues.¹⁸⁰

Recent experience has shown that faculties can and do strike even without any affiliation with a labor organization. Therefore, in a decision to choose between either an academic senate or a labor organization (or any other external representative organization), the latter can no longer argue that its strike policy provides it with a power no faculty senate could possess. It should be noted that faculty senates in colleges and universities have rarely struck over non-academic subjects such as wages and perhaps therein lies the decisive difference between a faculty senate and a labor union.

In summary, it would appear that whether a faculty's interests are represented by an internal or external organization, the use of the academic strike is a viable possibility. Thus, there seems to be harmony on the issue of whether a strike can be used, but "with respect to the propriety of faculty strikes, dissonance persists."¹⁸¹ Perhaps the best observation at the present time is that

[t]here have been too few strikes in higher education, public, or private, to permit useful analysis of their etiology or pathology. Nor can one predict with any confidence what will or should happen when a strike is unsuccessful and the striking faculty members are replaced or dismissed.¹⁸²

179. Ferguson, *supra* note 13, at 795-96.

180. TASK FORCE REPORT, *supra* note 4, at 51-52.

181. Brown, *supra* note 18, at 1079.

182. *Id.* at 1080.

2. *Constraints on Public Employer Decision Making*

The public employer negotiating the settlement of a dispute must consider constraints placed upon it by several forces outside its control, including market conditions and political, financial and legislative limitations. An internal or external organization representing a faculty will likely analyze and acknowledge that a public employer is to some extent limited by these forces. It is necessary that they be considered in formulating strategies so that appropriate procedures for dispute settlement can be utilized in attempting to obtain faculty requests. For example, if the public employer has conceded on economic demands up to the limits that the legislature has allocated for non-academic matters, what effect will an economic sanction such as an academic strike have on an administration or legislature in obtaining salaries above that amount? To the extent that a strike cannot obtain demands nor influence their realization, it would not be the appropriate sanction. Of course, any influence a particular sanction has, must be evaluated by the party using it. The more common constraints placed on public employers are discussed below.

(a) *Market Constraints*

It has been suggested that the natural difference of market places in which private and public employers compete makes the use of a strike inappropriate.¹⁸³ In other words, unlike the private sector, labor conflicts in the public sector are not between relative equals who are subject to free market economic forces working their own restraints on behavior.¹⁸⁴ Therefore, a strike will not put a public employer out of business. Public employers have no ability to raise the prices of services rendered, to subcontract work out, to move to another location or to shut down permanently.¹⁸⁵ Likewise, it is argued, public employers

183. See Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L. J. 418, 425 (1970). For a contrary view see Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L. J. 1107 (1969).

184. See generally Hilebrand, *The Public Sector*, in J. DUNLOP & N. CHAMBERLAIN, *FRONTIERS OF COLLECTIVE BARGAINING* 151 (1967).

185. Weisenfeld, *Public Employees Are Still Second Class Citizens*, 20 LAB. L.J. 138, 142 (1969). In this regard it has been stated that "teachers rarely need fear unemployment as a result of union-induced wage increases, and the threat of an important non-union rival (competitive private schools) is not to be taken seriously so long as potential consumers of private education must pay taxes to support the public

may not appropriately employ sanctions against its employees in the same way private employers do.¹⁸⁶

The basic legal difference between public and private employers is the lack of a profit motive in the public sector.¹⁸⁷ Whether this distinction is real for purposes of labor relations is arguable, but to those who advocate its validity, it provides a further basis for claiming that collective bargaining techniques such as the strike are inappropriate in the public sector.¹⁸⁸ Put another way, it is said that if an academic strike occurs, "the consequence of delay in the educational process of students ought not to be equated with the loss of profits to an industrial concern."¹⁸⁹ Therefore, an academic strike will not economically hurt the public employer to the extent that a strike in the private sector will, and it will not necessarily influence or cause the public employer to meet employee demands.

(b) *Political Constraints*

Political constraints placed on public employers also determine the latitude by which they may act in resolving disputes. To some extent, they are prohibited from acting arbitrarily because as public employers they are subject to political considerations. It has been stated that "all agree that the services performed by some public employees are in one way or another 'essential' and that this 'essentiality' is in some sense

school system." Wellington & Burton, *More on Strikes by Public Employees*, 79 YALE L. J. 441, 442 (1970).

186. For example, "lock-outs and the use of allies" in the event of employee strikes would be inappropriate on the college campuses. See Ferguson, *supra* note 13, at 780.

187. R. DOHERTY & W. OBERER, *supra* note 59, at 61. Likewise, it is argued, with the profit motive absent, the consequent motive of public employers to exploit public employees is also diminished. *Id.*

188. For example, in *Norwalk Teachers Assn. v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482, 484 (1951), the court stated: "under our system, the government is established by and run for all the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as effectively and economically as possible."

189. Ferguson, *supra* note 13, at 780. A parallel argument continues, "[o]n the contrary, trustees, regents, and board members have nothing to gain by depressing our salaries. They have no personal financial interests in the matter and they win prestige only as they provide stipends high enough to attract the most capable scholars and scientists among us to their institutions. Their prestige in fact is wholly dependent upon the prestige of the faculties they manage to recruit and retain." *Representative of Economic Interests*, 52 AAUP BULL., 229, 233 (1966).

related to society's ability to tolerate strikes."¹⁹⁰ Although policemen and firemen can be included in the definition with minimal controversy, a problem may arise when applying that term to education. While teachers may not be essential in that a teacher's strike might endanger public health or welfare, it may seriously inconvenience parents and other citizens who, as voters, may seek to punish the political leadership.¹⁹¹ Such pressure on the political leadership and legislators may sometimes help open the state's treasury to resolve labor disputes. This type of political constraint is typically felt by public employers in the field of education.¹⁹²

The argument is made that political pressure cannot be distinguished from economic pressure since the objective of each is to influence executive and legislative determinations such as the allocation of funds and the tax rate.¹⁹³ This may well be the case in academic strikes where often the economic pressure brought to bear against a university administration which has exhausted its resources is in actuality a demand to the legislature and taxpayers for more money.

(c) *Financial and Legislative Constraints*

Financial and legislative constraints are the greatest restraining forces on dispute settlement by public employers. Even if the employer wants to meet its employees' requests it may have no options open to it other than to use its influence to attempt to remedy the situation on the legislative level. Obviously, if finances are not available, there will be continued dissatisfaction among public employees who are demanding higher salaries. Without the "flexibility to meet at least the minimum of employee demands," it has been suggested that strikes and lesser work stoppages will continue among public employees.¹⁹⁴

In addition to the unavailability of funds, there may be related problems dealing with the coordination of the budget-making process with the negotiation process. For example, state law may require a university to submit a budget proposal by a certain deadline, which may be prior to the end of negotiations. A preliminary budget will be proposed based

190. Wellington & Burton, *supra* note 185, at 441.

191. *Id.* at 442.

192. It has been stated that public education is "close to the taxpayer's heart and, as a general proportion, his blood pressure tends to rise as the prospect of a loss of one of these services increases." Weisenfeld, *supra* note 185, at 142.

193. Burton & Krider, *supra* note 183, at 428-32.

194. Rehms, *supra* note 146, at 921, 924-25.

on estimates of the final negotiated settlement, causing the administration to take a rigid position during negotiations to prevent its estimate from being exceeded.¹⁹⁵

Another type of constraint may be legislatively imposed. For example, in Michigan and other states legislation limits the scope of subjects which may be negotiated by the public employer.¹⁹⁶ Therefore, economic sanctions taken against an administration to force it to bargain over legislatively excluded subjects are misguided, unless the sanctions have political implications.¹⁹⁷

In view of the number and magnitude of constraints placed on public employers, careful evaluation by faculty representatives is in order when planning the appropriate method of presenting requests and when selecting to whom they will be presented. The author suspects, however, that these constraints will be minimized in the eyes of faculty members. Absent effective alternatives, academic strikes will continue with pressure brought against administrations to reallocate resources from academic areas of the budget to non-academic areas (such as salaries), and from one college within a university to another.¹⁹⁸ The implications of this approach could well be felt in the future quality of education.

IV. COLLEGE FACULTIES: COLLECTIVE BARGAINING, THE LAW, AND POTENTIAL PROBLEM AREAS

Collective bargaining is a legal relationship between a faculty and its administration; therefore, those faculties which choose it as their means of faculty governance should understand which laws, if any, will govern their relationship with the administration. Depending on whether the institution is public or private, the nature of that relationship will be prescribed by federal or state laws. These laws and the potential problems of collective bargaining in higher education are examined below.

195. *Id.*

196. See, e.g., MICH. STAT. ANN. § 17.455(15) (1968) where subjects include "wages, hours, and other terms and conditions of employment."

197. See generally Note, *Collective Bargaining and the Professional Employee*, 69 COLUM. L. REV. 277, 298 (1969).

198. There was an analogous situation in a Michigan public school district where plans for an expanded vocational educational program were abandoned to meet salary demands of teachers who were threatening to strike. Rehmus, *supra* note 146, at 919-20.

A. Role of Federal Law

Since state educational institutions are excluded from jurisdictional coverage by the National Labor Relations Act (NLRA), and private colleges until recently had not had NLRB jurisdiction exercised over them, college and university administrators have not had to deal with the operations of the Act nor follow its legal developments.¹⁹⁹ However, it is increasingly evident that this legislation "has made a terrific impact on all employer-employee-union relations, including colleges and universities."²⁰⁰

1. Private Institutions

In a landmark decision involving Syracuse and Cornell Universities on June 12, 1970, the National Labor Relations Board asserted jurisdiction over non-profit colleges and universities which meet its jurisdictional standards.²⁰¹ In asserting jurisdiction, the NLRB overruled the leading case of *Trustees of Columbia University* in which the Board in 1951 declined to assert its jurisdiction over a ". . . non-profit, educational institution where the activities involved are non-commercial in nature and intimately connected with charitable and educational activities of the institution."²⁰²

The NLRB prefaced its holding by noting that union organization by both non-professional and academic employees on college campuses is growing and ". . . as advancing waves of organization swell . . . it is unreasonable to assume that . . . disputes will not continue to occur in the future."²⁰³ The Board then justified its assertion of jurisdiction by observing that since 1959, after Congress passed Section 14(c) of the National Labor Relations Act²⁰⁴ which allowed states to exercise jurisdiction when the Board declined to do so, only fifteen states had established labor laws to meet the needs of employees who were denied

199. See National Labor Relations Act, 29 U.S.C.A. § 151 (1947).

200. Lemmer, *The Impact of Labor Legislation on Colleges and Universities—Federal Labor Legislation and Jurisdiction*, THE COLLEGE COUNSEL, 159 (1967). See generally Ferguson, *supra* note 13.

201. Cornell University, 183 NLRB No. 41, 74 L.R.R.M. 1269 (1970). See generally McHugh, *National Labor Relations Board Goes to College*, COL. & UNIV. BUS. (July, 1970).

202. 97 NLRB No. 424, 29 L.R.R.M. 1098 (1951).

203. Cornell University, 183 NLRB No. 41, 74 L.R.R.M. 1269, 1275 (1970).

204. National Labor Relations Act § 14(c), added by 73 Stat. 541 (1959), 29 U.S.C. § 164(c) (Supp. 1963).

federal relief.²⁰⁵ Consequently, the Board stated, jurisdiction is asserted "to insure the orderly, effective and uniform application of the national labor policy."²⁰⁶

In deciding that a state-wide bargaining unit was appropriate, the NLRB applied the tests used in the industrial sector. Noting its inexperience in the educational area, the Board stated that it could reliably analogize that situation with those experienced in the industrial sector.

We are mindful that we are entering into a hitherto uncharted area. Nevertheless, we regard the above principles as reliable guides to organization in the educational context as they have been in the industrial, and will apply them to the circumstances of the instant case.²⁰⁷

It appears that when faculties designate a union, they will be placed in an industrial relations context, rather than receive special considerations that some argue are appropriate to the educational area.

The immediate effect of the *Cornell University* decision on private colleges and universities is that they, as well as their faculties, will have NLRB procedures and remedies available to them should a collective bargaining agent be designated.²⁰⁸ The long range effect of this decision raises significant questions for higher education in general: (1) Since

205. Of the states having labor laws to meet the needs of NLRB-excluded employees, only eight states have legislation expressly covering employees of private educational institutions. See *Cornell University*, 183 NLRB No. 41, 74 L.R.R.M. 1269 (1970). Section 14(c) of the NLRA was passed two years after the United States Supreme Court ruled that states were powerless to entertain cases which fell within the NLRB's jurisdiction even though the Board had declined to assert such jurisdiction. *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957). For a thorough discussion of this "no-man's land" created when neither federal nor state relief was available, see Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Law*, 65 WIS. L. REV. 411, 416-18 (1965).

206. *Cornell University*, 183 NLRB No. 41, 74 L.R.R.M. 1269, 1274-75 (1970).

207. *Id.* at 1276.

208. It is interesting to note that the University filed the petition asking the NLRB to assert jurisdiction. Over a year earlier, it had been predicted that this type of situation might develop, especially in New York, because New York had recently eliminated the exclusion of private educational institutions from coverage of its state labor relations act, and that act did not contain provisions restricting labor unions from engaging in unfair labor practices. To an employer who saw the inevitability of its employees forming a union, it may well have been wise to seek coverage under the federal statute to obtain the benefits of the restrictive provisions of the federal statute, and reciprocal unfair labor practice provisions. See Ferguson, *supra* note 13, at 784.

strikes are permitted under federal law, what impact will this have on public employee collective bargaining where the strike is prohibited by state law? (2) Will these new rights and remedies for private colleges and their faculties (e.g., the right to strike, and remedies against unfair labor practices by either the union or the employer) create a demand for equal rights and remedies by public colleges and their faculties? (3) What would be the effect on public educational institutions if private sector concepts were applied in labor relations matters?

2. *Public Institutions*

State colleges and universities have been expressly excluded from coverage by the federal law: "The term 'employer' . . . shall not include any state or political subdivision thereof . . ." ²⁰⁹ Neither are their employees "employees" within the meaning of the Act.²¹⁰ Therefore, the significance of labor legislation on the operations of public institutions is necessarily indirect, but it is very real.

3. *Impact of Federal Law on Public Colleges and Universities*

Although federal law is inapplicable to public colleges and universities, its statutory and decisional principles have long been emulated by state agencies. Typically, industrial relations concepts are reflected in state public employee legislation which most frequently is modeled after the NLRA.²¹¹ Although state agencies often point out that they are not bound by NLRB decisions,²¹² they consistently look to NLRB and court interpretations of the federal law as guidelines in defining the state law.

In view of the recent *Cornell University* decision, there will un-

209. National Labor Relations Act, 29 U.S.C.A. § 152(2) (1964).

210. In the following cases, NLRB Regional Directors dismissed representation petitions on that basis: Board of Regents, The University of Michigan, Case No. 7-RC-1208 (1951, unpublished); Louisiana State University, Case No. 15-RC-3329 (1966, unpublished); and University of Rhode Island (Motor Vessel Trident), Case No. 1-RC-7773 (1964, unpublished); see Lemmer, *supra* note 200.

211. See generally Smith & Clark, *supra* note 205. See also Smith, *supra* note 77, at 904.

212. In Michigan, see, e.g., Eaton County Road Commission, Mich. Lab. Med. Ops. Case No. C67, B-12 and R67, A-16 (1967). However, in a speech before the Association of Labor Mediation Agencies in August, 1967, Robert Howlett, chairman of Michigan's state labor board, stated, "Michigan's PERA applies the industrial procedures of representation, unfair labor practices and collective bargaining to the public sector." See LABOR RELATIONS YEARBOOK (1967).

doubtedly develop a body of decisional law relative to private educational institutions. One can safely predict that state administrative agencies and courts will look to these decisions when faced with similar situations in cases involving public colleges and universities. The author suspects that in the future, should collective bargaining gain favor on the public campuses without coextensive state legislative rights and remedies for public employees and employers, then the same justifications for NLRB jurisdiction will exist as in the *Cornell University* case. Public employers and employees alike may seek legislative changes to allow coverage under the NLRA. Regardless of whether it is by new legislation or by state application of present legislation, it would appear that federal private industrial relations concepts will be used in the public employee sector including the college campus setting, notwithstanding the fact that federal law presently does not apply to public institutions.

B. State Labor Legislation

As public employees are excluded from coverage under federal labor law, state labor laws and state judicial decisions govern the legality of union organization and strikes.²¹³ Presently there is no state public employee labor legislation which distinguishes between employees in higher education and those in elementary or secondary education. In fact, very few states distinguish between public employees in the area of education versus those employed in other areas.²¹⁴ Moreover, few states have established different administrative agencies to administer public sector law and private sector law, which suggests why there is rarely any difference in approach or concept between the two.²¹⁵

1. Anti-Strike Legislation

In recent years, a number of states have enacted legislation providing

213. For a table of state labor legislation see Ferguson, *supra* note 13, at 786-89. See Rubin, *A Summary of State Collective Bargaining Law in Public Employment*, PUBLIC EMPLOYEE RELATIONS REPORT No. 3 (New York State School of Industrial and Labor Relations, Ithaca 1968); Comment, *supra* note 146.

214. Ferguson, *supra* note 13, at 786-89. Some authors have taken issue with the propriety of modeling labor laws which affect college faculties after private industry models. For example, "... recent statutes that legitimize and encourage public employee bargaining are clearly not even-handed when they are applied to higher education. They assume the primacy of the trade-union model and ignore the unique characteristics of the academic community." Brown, *supra* note 18, at 1073.

215. For a survey of the various approaches taken by states see Smith, *supra* note 77, at 898-901.

collective bargaining rights for public employees, including those employed in education.²¹⁶ Thus, by legislation or judicial decision, all states but Alabama appear to have provided for bare unionization of public employees.²¹⁷ However, with the exception of Vermont,²¹⁸ the states have invariably reaffirmed the traditional prohibition against strikes by these same public employees.²¹⁹ The anti-strike statutes usually provide for fines, discharge, and loss of employment rights for those participating in a strike.

Michigan law is exemplary of many state public employee statutes where on the one hand rights are granted and on the other hand they are limited. Michigan public employees were granted collective bargaining rights by the 1965 Public Employment Relations Act (PERA).²²⁰ The Act recognizes the right of public employees to join labor organizations, and it specifies election proceedings for the determination of an exclusive bargaining representative for an appropriate unit.²²¹ However, the Michigan law retained the strike prohibition that had existed prior to its enactment.²²² Several reasons why states have chosen to distin-

216. See note 213 *supra*.

217. See *International U. of Op. Eng., Local 312 v. Waterworks Bd. of City of Birmingham*, 276 Ala. 462, 163 So. 2d 619 (1964).

218. Vermont has recognized a right to strike for situations in which the exercise of such right does not endanger the public health, welfare and safety. VT. STAT. ANN. tit. 21, § 1704 (Supp. 1968). See also Smith, *supra* note 77, at 910, for a similar proposal.

219. See, e.g., *State Bd. of Regents v. United Packing House Food and Allied Workers, Local 1258*, — Iowa —, 175 N.W.2d 110 (1970).

220. MICH. COMP. LAWS ANN. §§ 423.201-.254 (1967). No distinctions were made for teachers, although a bill had been introduced which would have granted separate representation rights to teachers. This had been sponsored by the Michigan Education Association, which, after the bill's defeat, joined with the Michigan Federation of Teachers in supporting the bill finally enacted into law. See M. Moskow, *supra* note 116, at 48.

221. MICH. COMP. LAWS ANN. §§ 423.201 -.254 (1967). It also prohibits interference or discrimination by the employer, MICH. COMP. LAWS ANN. § 423.210 (1967); requires the governmental employer to bargain in good faith, § 423.215; and provides the employee with remedies for employer unfair labor practices, § 423.216. It also provides for mediation services when an impasse arises with fact-finding and non-binding recommendations as the terminal point of the impasse procedure. See note 220 *supra*.

222. MICH. COMP. LAWS ANN. § 423.202 (1967). It has been suggested, however, that the strike question in Michigan is not finally settled. See Smith, *supra* note 77, at 909. The new strike law did repeal several sanctions previously associated with the strike prohibition; i.e., the 1965 amendment repealed Law of July 3, 1947, No. 336, § 4 [1947] Mich. Acts 633, providing for automatic termination of employment for violation of the Act and § 8, providing criminal penalties for any non-employee inciting a strike.

guish between private and public employment on the strike question²²³ are listed below.

2. *Reasons for Anti-Strike Legislation*

The traditional reason advanced for banning strikes by public employees is that such strikes constitute an impermissible interference with the sovereignty or governmental function of the state, and reflect adversely on the employees' loyalty.²²⁴ In a recent case where striking teachers were enjoined, an Illinois court declared that "the underlying basis for the policy against strikes by public employees is the sound and demanding notion that governmental functions may not be impeded or obstructed. . . ." ²²⁵ In a recent New York case where striking teachers were enjoined, the court explained its rationale:

From time immemorial, it has been a fundamental principle that a government employee may not strike. In this sensitive area, neither labor—the public employee—nor management—the governmental agency—in their mutual interdependence can afford the indulgence of arbitrary self-interest at the expense of the public.²²⁶

As yet there has been no United States Supreme Court decision on the anti-strike question and only occasionally will a court raise objections to the present system.²²⁷

Another argument is that anti-strike legislation is constitutional only when the health, safety and welfare of the public are endangered; therefore, a qualified right to strike should be given to those employees whose striking would not interfere with essential services, *i.e.*, those relating to the public's health, safety and welfare.²²⁸ The difficulty with this

223. See also Anderson, *supra* note 151, at 956-60.

224. See generally *id.* at 959; Neiryneck, *supra* note 5, at 305; Smith, *supra* note 77, at 909.

225. Board of Educ. v. Redding, 32 Ill. 2d 567, 571-72, 207 N.E.2d 427, 430 (1965); other pronouncements using this rationale have been: "Such action, looking forward toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable. . . . It is the first step toward anarchy." Teachers v. Board of Public Instruction, 69 L.R.R.M. 2466, 2468 (1968).

226. Board of Educ. v. Shanker, 66 L.R.R.M. 2308 (1967).

227. R. DOHERTY & W. OBERER, *supra* note 59.

228. Anderson, *supra* note 151, at 949. It has been argued, however, that as advisable as that might be, the current political climate is not receptive to the qualified right to strike for public employees. Gov't. EMPLOYEE REL. REP. E-1, E-9, No. 268 (Oct. 28, 1968).

"essentiality" test is defining it. There are those who advocate prior legislation in those areas which are essential.²²⁹ Others insist that the decision on the essential nature of a service cannot be made in advance of a strike, because in each case there are varying factual circumstances which should be considered by the courts or an impartial agency which would then render a decision on an ad hoc basis.²³⁰ Policemen and firemen are usually the groups singled out as performing essential services requiring special no-strike legislation.²³¹ As yet, educators have not been placed into this category, although some states do have specific legislation covering teachers apart from other public employees.²³²

A final argument, and one which forms the theoretical basis for much of the anti-strike legislation, is the conviction that ". . . the political process can be substituted for the strike weapon as an orderly method of dispute resolution."²³³ Since bargaining in the public sector concerns the allocation of public resources, it is a political matter and one requiring a political settlement rather than economic coercion; if policies are disliked, new officials should be voted into office. The strike cannot be part of the negotiating process in the public sector because constraints on the market place affect collective bargaining in private employment, whereas the constraints on public employment are imposed by the democratic political process.²³⁴ Often courts will seize upon this point to justify the prohibition of public employee strikes. For example, in a recent case upholding New York's Taylor Law ban on strikes the court stated:

The necessity for preventing goods or services being priced out of the market may have a deterrent effect upon collective bargaining negotiations in the private sector, whereas, in the public sector, the market place has no such restraining effect upon the

229. See Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly?*, 67 MICH. L. REV. 971 (1969).

230. Shanker, quoted in GOV'T. EMPLOYEE REL. REP. B-5, No. 276 (Dec. 23, 1968); see also Burton & Krider, *supra* note 183, at 432-37; and, Wellington and Winter, *supra* note 185.

231. See, e.g., Mich. Pub. L. No. 312 (Aug. 14, 1969); PA. STAT. tit. 43, § 217 (Supp. 1970). Most often the denial of the right to strike is coupled with compulsory arbitration. See, e.g., Anderson, *supra* note 151, at 949 n. 26.

232. See note 213 *supra*.

233. Anderson, *supra* note 151, at 953.

234. See generally Burton & Krider, *supra* note 183, at 425-28.

negotiations and the sole constraint in terms of the negotiations is to be found in the budget allocation made by responsible legislators.²³⁵

If the political process were not substituted for the strike, and a policy of permitting strikes by public employees were adopted, there would, in effect, be a transfer to such employees of all legislative, executive, and judicial powers now vested in duly elected or appointed officials.²³⁶

Whichever justification a state uses to uphold anti-strike legislation, the events of recent years indicate that they are not accepted by public employees who are walking off their jobs in increasing numbers.

3. *The Apparent Ineffectiveness of Present Anti-Strike Legislation*

(a) *Strikes Continue*

In 1967, Robben W. Fleming, President of the University of Michigan and a noted labor expert, stated that if laws and society are not in harmony on the question of strikes a destructive confrontation could result.

In my judgment the danger that any strike against the government will undermine our democracy is counterbalanced by the equally dangerous contempt for the law which results from the prohibition of all strikes and leads to its frequent violation. If this prohibition continues, either it will lead to this contempt for the law, or there will be great public pressure for it to be applied against strikes in the private sector as well.²³⁷

That the no-strike law was ineffective as applied to secondary and elementary teachers became apparent soon after legislation was passed permitting public employees to organize. Prior to 1966, teachers' strikes were relatively infrequent. Between 1960 and 1965, there was a total of twenty-five strikes involving 44,000 teachers. There were thirty-three in 1966, eleven in the first quarter of 1967,²³⁸ and one hundred and thirty in 1968.²³⁹

235. *City of New York v. DeLury*, 23 N.Y.2d 175, 186, 243 N.E.2d 128, 133-34, 295 N.Y.S.2d 901, 909 (1968).

236. Seitz, *School Boards and Teacher Unions*, 141 AMER. SCHOOL Bd. J. 11 (Aug. 1960).

237. Fleming, *Introduction* in *FRONTIERS OF COLLECTIVE BARGAINING* 1, 11-12 (1967).

238. Glass, *Work Stoppages and Teachers: History and Prospect*, 90 MONTHLY LAB. REV. 43, 45 (Aug. 1967). Eleven of the strikes of 1966 were by NEA affiliates, twenty by AFT affiliates and two by independent organizations. The average teachers' strike

In higher education, academic strikes have not been as frequent. However, they have been occurring. In 1966, after twenty-two faculty members of St. John's University (N.Y.) were suspended, the first major faculty strike against a university administration occurred.²⁴⁰ In 1967, there was a class boycott by teachers against the administration of Catholic University for not retaining a faculty member.²⁴¹ Both of these strikes were primarily directed at educational and administrative policies. At Chicago City College, a strike which had primarily economic aims resulted in recognition of a union and salary increases.²⁴² In the spring of 1970, some faculty members of the University of Michigan stayed away from classes to support student demands for a greater allocation of resources to minority students.

(b) Definitional Strike Problems and the Laws' Circumvention

Part of the problem in public employee strikes is to ascertain when a strike legally occurs. Should a general strike prohibition be construed to include a variety of concerted actions undertaken to advance collective bargaining aims even though they may be something less than a formal strike? For example, do "professional study days," "slow-downs," "blue-flu" (policemen), "white-flu" (nurses), "mass resignations," and refusals to sign individual contracts constitute strikes within the meaning of state legislation?²⁴³ Although the above techniques may help to circumvent the literal wording of many statutes, some states, such

in 1966 lasted 1.8 classroom days compared with 14.1 man days for strikes by industrial employees. *Id.* at 43. Also in 1966, only sixteen of the strikes were over salaries or hours, whereas nine were over questions of representation and eight had to do with school conditions and policies. *Id.* at 44. See also Susskind, *Teacher Strikes!! What Can Be Done About Them*, 49 MICH. S. B. J. 28 (Feb. 1970); Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969); Neirnyck, *supra* note 5. In Michigan there were 11 teacher strikes in 1965-66, Rapoport, *Militant Public Employees*, Wall St. J., Aug. 9, 1966, at 14, col. 4, and in 1967 there were 36 teacher strikes, 11 by MFT affiliates and 25 by MEA affiliates. C. REHMUS & E. WILMER, *supra* note 6, at 4.

239. Wollett, Gov't. EMPLOYEE REL. REP. B-6, No. 337 (Feb. 23, 1970). In 1967-68, it was reported that of 114 teacher walkouts in all states, 47 occurred in Michigan. Gov't. EMPLOYEE REL. REP. B-9, No. 276 (Dec. 23, 1968).

240. Ferguson, *supra* note 13, at 804.

241. *Id.*

242. Marmion, *Unions and Higher Education*, EDUC. REC. (Winter, 1968).

243. See generally R. DOHERTY & W. OBERER, *supra* note 59, at 102; M. MOSKOW, *supra* note 116, at 197; Kheel, *supra* note 238, at 935; Smith, *supra* note 77, at 915.

as Michigan, have gone to great lengths to define strikes conceptually and functionally.²⁴⁴

Whether imaginative attempts to circumvent anti-strike legislation will be successful may well depend on court interpretations.²⁴⁵ The language in the Michigan statute would seem to be comprehensive enough to include concerted action short of total work stoppage, if such action is designed to change the conditions, compensation, rights, privileges or obligations of employment. However, it appears that it will not include many types of faculty action where the motive is not to affect an employment relationship, but is designed to affect educational and public issues.²⁴⁶ As most anti-strike laws are presently written, such conduct would be outside the proscription of the statutes and, therefore, remedies such as an injunction would be unavailable to the employer.²⁴⁷ These legal remedies would not be needed, however, since the professor's conduct would not be a protected concerted activity which would protect him from discipline or discharge for failure to fulfill his duties. Whether present laws could be expanded to proscribe such activities is doubtful because of the serious constitutional problems this would raise regarding the restriction of free speech and the enforcement problem.

(c) *The Enforcement Problem*

The larger and more difficult question is: Once employees are said to

244. Michigan law not only defines strike, it elaborates on when a public employee is deemed to be on strike. See MICH. STAT. ANN. § 17.455(1) and (6) (1968) respectively.

245. In cases involving employee activities short of refusals to work under unexpired contracts, the following have been construed as strikes: NEA's "Sanctions," Board of Educ. of Union Beach v. New Jersey Educ. Ass'n, 53 N.J. 29, 247 A.2d 867 (1968), involving blacklisting of school district; Board of Educ. of New York v. Shanker, 54 Misc. 2d 941, 283 N.Y.2d 548 (Sup. Ct. 1967), involving purported mass resignations; refusal by firefighters to engage in routine or administrative work, Gov't. EMPLOYEE REL. REP. B-9, No. 271 (Nov. 18, 1968); airport traffic controllers "sick out," Gov't. EMPLOYEE REL. REP. A-9, No. 302 (June 23, 1969). For a general discussion of the use of strike substitutes in the public sector see Wortman, *Collective Bargaining Strategies and Tactics in the Federal Civil Service*, 15 LAB. L. J. 482, 489 (1964).

246. For example, in 1970 some of the faculty at the University of Michigan "withheld their services" over the issue of allocation of resources to black students. This type of problem is not necessarily limited to higher education; as was recently noted: "Public employee strikes increasingly involve disputes over social policy as well as over conditions of employment." Anderson, *supra* note 151, at 955.

247. This may depend on whether a particular court hearing the case can find that the social or educational dispute which prompted the walkout was related to "terms and conditions of employment." Most often, however, social issue strikes are short and do not always command full participation, and it is therefore unlikely that an employer would need to seek legal remedies.

have engaged in an illegal strike, will the law be enforced; and if so, what sanctions will the court impose?

Sanctions for violation of anti-strike laws were more punitive in the past than today on the theory that they would deter future strikes.²⁴⁸ However, it was found that the punitive approach did not effectively prevent public employees strikes.²⁴⁹ When enforcement is discretionary with the employer, sanctions are rarely invoked since dismissed employees may be hard to replace, and it would only tend to exacerbate the existing situation.²⁵⁰ Moreover, since a strike occurs after negotiations break down, sanctions applied at this point may encourage employee militancy and a continued break-down of negotiations.²⁵¹ Injunctive sanctions with the threat of contempt citations often raise cries of involuntary servitude from the employees which can result in adverse public relations for the school administration.²⁵²

The use of injunctions against striking teachers, with contempt cita-

248. New York's Condon-Wadlin Law, before its repeal, provided for the automatic dismissal of striking employees with the provision that any striker subsequently rehired could not receive higher pay for three years following the strike, and would remain on probation for five years. Law of March 27, 1947, ch. 391, § 1, [1947] N.Y. Laws 842, *as amended*, Law of April 23, 1963, ch. 702, [1963] N.Y. Laws 2432 (repealed 1967). Under New York's new Taylor Law penalties against the union include loss of dues, check-off privileges, and withdrawal of recognition. Penalties against the employees include, for each strike day an employee must have the equivalent of two days pay deducted from his paycheck. Ch. 24, § 8 [1969] N.Y. Laws 42-43 (McKinney Supp. April 10, 1969), *amending* N.Y. CIV. SERV. LAW § 210(2) (McKinney Supp. 1968). In *Board of Educ. of New York v. Shanker*, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1965), a fine of \$150,000 was assessed against the United Federation of Teachers for conducting an 18-day walkout against New York City's public school system. The state trial court also levied a \$250 fine and imposed a 15-day jail sentence on the union president for contempt of a court order. *See* Susskind, *supra* note 238, at 29. Minnesota law is similar to the Condon-Wadlin Law, *see* MINN. STAT. ANN. § 179.55 (1966). In Michigan all statutory sanctions have been removed except for the employer's discretionary right to dismiss or discipline a striking employee, and its impact is diminished by the statute's procedural safeguards for the employee. MICH. COMP. LAWS ANN. § 423.206 (1967).

249. *See* Neirnyneck, *supra* note 5, at 305-07; Comment, *supra* note 146, at 269-71.

250. Seitz, *Public Employee Negotiating and School Board Authority*, LEGAL PROBLEMS OF SCHOOL BOARDS 144-146 (A. Reznay ed. 1966); Comment, 33 U. CHI. L. REV. 852, 860 (1966).

251. N.Y. Times, Sept. 19, 1967, at 36, col. 8, noting that the Detroit School Board did not seek an injunction because the dispute would be settled more easily over the bargaining table.

252. The argument that the use of an injunction in public employee labor disputes violates the constitutional prohibition against involuntary servitude and abridges freedom of speech has not won court approval. *See* Comment, *supra* note 146, at 266 n.36.

tions for their violation, has recently been limited in Michigan. In *School District v. Holland Education Ass'n*,²⁵³ a strike was enjoined and the teachers were ordered to refrain from further strike action. On appeal, the Michigan Supreme Court held that even though the courts have the power to issue injunctive relief against strikers in the public sector, they are not required to do so in every case. When a strike occurs, the employer must also show that irreparable harm to the public will result from the strike.²⁵⁴ The court stated that

. . . it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that ipso facto such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace.²⁵⁵

An employer seeking an injunction in Michigan must now meet that burden of proof as well as show that he bargained in good faith and was not the cause of the strike.²⁵⁶ It is arguable that the court's decision has established a qualified right to strike for public employees in those situations where it will not irreparably injure public interest. Since strike legislation means little without enforcement machinery, it is submitted that a legislature can give tacit recognition to the right to strike by public employees by leaving judicial decisions like the *Holland Educ. Ass'n* unchanged, and without taking the politically hazardous approach of passing legislation to that effect.

253. 380 Mich. 314, 157 N.W.2d 206 (1968).

254. Susskind, *supra* note 238, at 29.

255. 380 Mich. at 326, 157 N.W.2d. at 210. Thus, in effect, the court applied the standards for enjoining strikes by public school teachers that it has applied to strikes by employees in the private sector. Although it has no statute similar to the Norris-LaGuardia Act restricting the use of injunctions in labor disputes, Michigan courts have developed a policy against issuing injunctions absent a showing of violence or irreparable harm. *Id.* See also *Cross Co. v. Local 155, UAW*, 371 Mich. 184, 123 N.W.2d 215 (1963).

256. In effect, the employer must now have "clean hands" before an injunction will issue. 380 Mich. at 327, 157 N.W.2d at 211. This approach had been recommended earlier in ADVISORY COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, REPORT TO GOVERNOR ROMNEY 15 (February 15, 1968). The New Jersey Supreme Court recently considered this issue in *Board of Educ. of Union Beach v. New Jersey Educ. Assn.*, 53 N.J. 29, 43, 247 A.2d 867, 875 (1968) and held that clean hands was no bar to injunctive relief when public welfare *might* be harmed. For a general discussion of *School Dist. v. Holland Educ. Ass'n*, see Comment, *supra* note 146. For a summary of how various states approach this problem, see Smith, *supra* note 77, at 910-14.

In summary, the increasing incidence of public employee strikes, despite their illegality, suggests that present legislation is ineffective. The fundamental inconsistency between granting a right to bargain collectively while at the same time prohibiting strikes as a means of supporting bargaining demands also suggests that new methods of dispute settlement may be needed.²⁵⁷ In assessing whether the strike prohibition in public employment is a realistic and equitable policy or whether it must give way to a limited and qualified right to strike, it has been noted:

... I very much doubt that public sector strikes will wholly disappear. My guess is that their incidence will rise as the areas of organization and collective bargaining in the public sector expand. If this prognostication is accurate, there will be further support for the thesis that strikes cannot really be prevented. Unless we accord public employees at least a limited right to strike, we will be in danger—and perhaps already are—of according a kind of de facto recognition to conduct officially declared illegal. This state of affairs is scarcely desirable in any society which purports to order its human relations according to the processes of law.²⁵⁸

C. Potential Problem Areas of Collective Bargaining in Higher Education

Most areas of collective bargaining are not yet developed in higher education; however, as law does develop there may be several concepts which present courts, state labor boards, and college faculties with great difficulties. Exclusivity of a bargaining agent, the definition of appropriate bargaining unit, establishment of the scope of bargainable subjects, and the role of a faculty senate, are concepts which are just beginning to develop and not necessarily in a uniform direction.

1. Bargaining Agent as Exclusive Representative

When an organization has gained the allegiance of a majority of the faculty, a question arises concerning the exclusivity of the bargaining agent: Should the majority organization have the exclusive right to represent all persons within the appropriate unit, thereby depriving all

257. Perhaps a better suggestion is embodied in the adage that legislators "should stop worrying about strikes and start worrying about what causes public workers to strike." Burton & Krider, *supra* note 183.

258. Smith, *supra* note 77, at 917.

other organizations of any direct voice in the bargaining process? Exclusive negotiating rights have been defined as the "right[s] and obligation[s] of an employee organization designated as majority representative to negotiate collectively for all employees, including non-members, in the negotiating unit."²⁵⁹

Exclusive representation can serve several important functions including: (1) placing responsibility upon one organization so that if employees are dissatisfied they know whom to blame; (2) providing a unified front for the employees; and (3) fixing the responsibility of the employer who is required to meet with a single representative. Supporters of the principle of granting a bargaining agent exclusive rights for a certain period where an agreement can be negotiated without challenge by another organization,²⁶⁰ contend that it is a necessary precondition for the development of a sound and stable bargaining relationship.²⁶¹

The alternative to exclusivity is proportional representation, which allows multiple representatives of faculty members to deal with the administration. Proportional representation is attractive to some, especially at multi-universities, because by definition it allows minority representation.²⁶² This must be balanced, however, against the possibility of chaos resulting from the lack of a unified faculty voice. As one author stated:

Proportional representation . . . divides the representation on the teachers' side, transfers to the bargaining table the competition of views between the contending teacher organizations instead of resolving them at the representation stage, and thereby impairs the process of reaching agreement. . . .²⁶³

259. LIEBERMAN & MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS—AN APPROACH TO SCHOOL ADMINISTRATION* 421 (1966).

260. In Michigan, as under federal law, a state labor board certification permits a one year "grace period" to reach an agreement during which time competitive organizations may not seek recognition. Once an agreement is reached this "bar" may be extended over the life of the agreement up to three years per agreement. *See* MICH. STAT. ANN. § 17.455(14) (1968).

261. TASK FORCE REPORT, *supra* note 4, at 46. NEA and AFT both favor this, the exclusivity principle, *see* R. DOHERTY & W. OBERER, *supra* note 59, at 76.

262. *See generally* SHILS & WHITTIER, *TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING* 136-37 (1968). This, of course, should be distinguished from a single organization such as a faculty senate where representatives may be selected on a proportional basis. The type under discussion deals with *e.g.*, the AAUP representing 20 percent of the faculty, the NEA 20 percent and the AFT 20 percent, all meeting with the administration over matters of common concern.

263. R. DOHERTY & W. OBERER, *supra* note 59, at 75.

Another argument against proportional representation is that without exclusivity there is a possibility that the employer might favor minority groups in an attempt to undermine the majority position. Opponents point to the same possibility when there is an exclusive representative.²⁶⁴

The major opponent of exclusivity has been the AAUP which believes that a professional organization should always have access to governing powers so that it can promote and help the realization of professional ideals.²⁶⁵ In addition to the fear of losing access to university officials, the AAUP advances the admonition "that exclusivity will combine with a broad range of bargainable issues to exclude the faculty's internal agencies from any meaningful role in governance."²⁶⁶ That is, the exclusive representative would likely assume responsibility over matters formerly of concern to a faculty senate, thus squeezing the senate out of meaningful participation. Even though the AAUP has taken the position that it will act as an external agency, it is not ambivalent in its opposition to exclusivity. It urges any of its components that may achieve representative status to create an orderly procedure within the faculty governmental structure "for prompt consideration of problems and grievances of faculty members to which procedure any individual or *group* shall have full access."²⁶⁷ In states not having applicable legislation, these issues can be perplexing.²⁶⁸ Michigan law and federal law, grant the right of exclusivity.²⁶⁹

2. *Appropriate Bargaining Unit*

Once the decision is reached whether or not the representative is to be granted exclusive bargaining rights, the question of over whom the agent exercises these rights arises. That is, what is the appropriate bar-

264. It should be noted that where there are "multi-universities" within the same governing system, the concept of proportional representation appears to be more viable, and a master agreement could be reached with supplemental agreements covering the problems of individual campuses.

265. Brown, *supra* note 18, at 1072.

266. *Id.* at 1076.

267. *Policy on Representation of Economic Interests*, *supra* note 98, at 154 (emphasis added).

268. For an example of a recent decision prohibiting a university from granting exclusive bargaining rights, absent legislation, to a group of non-academic employees, see *State Bd. of Regents v. United Packing House Workers, Local 1258*, — Iowa —, 175 N.W.2d 110 (1970).

269. MICH. STAT. ANN. § 17.455(11) (1968).

gaining unit?²⁷⁰ Usually this decision is made by an administrative body of government, such as the NLRB for private sector employees and a state agency for public employees. The issues will revolve around—who are members of a faculty? Who are supervisors? Are researchers, librarians, instructors, and teaching fellows included? Should institutional practices be controlling, or should general standards used by colleges and universities throughout the state or nation be sought? The usual industrial approach in answering these questions is to determine those academic persons having a sufficient community of interest. They will be the appropriate bargaining unit. In a recent election among faculty members at City University of New York, the New York Public Employment Relations Board established two units by distinguishing between those positions in which the occupants were eligible for academic tenure and those in which they were not.²⁷¹

In Michigan, although not answering the question of the appropriate composition of a bargaining unit, the Supreme Court has indicated the approach to be used by the state labor board in its determination. It directed the state's administering agency, MERC, "to designate as the appropriate unit, the largest unit, which in the circumstances of the particular case, is most compatible with the purpose of the law and to include all common interests in a single unit."²⁷² The appropriate unit among academic personnel at a particular university will depend on the nature of the university (day and night program? multi-campus?). It is submitted that the proper approach to this problem is not to make uniform rules to be applied to all universities, but rather to use an ad hoc approach as suggested by the Michigan case above.

Another problem deals with who are supervisors and whether they should be excluded from an appropriate employee bargaining unit. Most states uniformly exclude supervisors as does the National Labor Relations Act.²⁷³ That rule has been followed in Michigan,²⁷⁴ although there

270. See generally PRASOW, *UNIT DETERMINATION IN PUBLIC EMPLOYMENT—CONCEPT AND PROBLEMS* (1969).

271. McHugh, *Collective Negotiations in Public Higher Education*, COL. & UNIV. BUS. 42 (Dec. 1969). A delineation was made between about 6000 part-time and temporary faculty members and about 5000 full-time faculty. N.Y. Times, Dec. 7, 1968, at 56, col. 1. Additional problems, not discussed here, can arise in bargaining unit questions if a university is part of multi-university system as was the case in New York.

272. *Hotel Olds*, 333 Mich. 382, 53 N.W.2d 302 (1952).

273. The National Labor Relations Act, 29 U.S.C. § 152(3) (1954) excludes supervisors from collective bargaining units. The Michigan Public Employment Relations Act, however, permits supervisors to form their own collective bargaining units.

are several recent cases indicating that supervisors in education may be treated differently from their public employee counterparts. Two state labor board decisions held that supervisors may maintain membership in an employees' union, but they may not participate in activities which pertain to the union's status as a collective bargaining agent,²⁷⁵ such as voting in elections, holding office, and attending internal business or labor relations meetings. If they engage in activities which would interfere with the organizational rights of the employees or support the labor organization, they are guilty of committing unfair labor practices.²⁷⁶ In one case, Michigan's labor board stated:

It is common knowledge that in the field of education, employee associations have traditionally been active in many areas to the mutual benefit of their members. Only recently, under the amendments to PERA have they assumed the new role of collective bargaining representative for teachers. There is no reason to conclude that such activities and endeavors will not be continued. We see no reason for prohibiting executives and supervisors from belonging to such organizations for the purpose of participating in the benefits that may accrue to them.²⁷⁷

However, in a recent court case involving the question of whether non-academic supervisors (engineers) for a public school district could form a union, the court stated that the state labor law ". . . does not prohibit those employees engaged in executive or supervisory positions from organizing, but only that they shall not be included in a bargaining unit containing non-supervisory employees in the same plant or business enterprise."²⁷⁸ Whether this statement is intended to broadly

See, e.g., Hillsdale Community Schools, 1968 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 859; School District v. Labor Mediation Board, 73 L.R.R.M. 2787 (Feb. 1970).

274. *See, e.g., Henry Ford Community College, 1969 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 64. Contra, Southwestern Michigan College, 1969 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 89.*

275. *School Board of City of Grand Rapids, 1966 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 282; Livonia Public Schools, 1967 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 282; Livonia Public Schools, 1967 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 780. See also, Clary, Pitfalls of Collective Bargaining in Public Employment, 18 LAB. L. J. 406, 410 (1967).*

276. *Michigan Public Employment Relations Act, MICH. STAT. ANN. REV. § 17.455(10) (1968).*

277. *School Board of City of Grand Rapids, 1966 MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 282.*

278. *School Dist. v. Labor Mediation Bd., 73 L.R.R.M. 2787 (Feb. 1970).*

cover academic personnel in higher education or is limited to non-academic public employees is unknown.²⁷⁹ However, the literal wording of the state's public employee law does not explicitly prohibit supervisors from inclusion in an appropriate bargaining unit.

Moreover, in a recent state labor board unfair labor practice proceeding, a trial examiner held that a Michigan State department's faculty organization was not employer-dominated and "... it is unrealistic ... to apply NLRA principles to the system of self-government by the university faculty or to equate college administrators ... with ... foremen and supervisors in a manufacturing or retail entity."²⁸⁰ In summary, at the present time it appears that the usual rule of disallowing supervisors in an employee bargaining unit may prevail, but there are indications it may be reexamined in view of the needs of higher education.

3. *Appropriate Scope of Subjects for Collective Bargaining*

(a) *Academic versus Non-academic Subjects in Higher Education*

Since faculty members are both professionals and employees, their interests span a wide range of substantive issues. There is a somewhat reflexive compulsion to label educational policies as academic issues and economic considerations as non-academic issues. With these two basic issues in mind, it is worth a thorough analysis to examine the subjects of concern to faculty members and determine in which category they fit. There are some who argue that in higher education there can be no distinction made between academic and non-academic issues.

The fundamental fact, of course, is that every budgetary appropriation—whether it has to do with more buildings, or secretaries, or research, or salaries, or leaves, or whatever—is justified, in a college situation, precisely on the grounds of its contribution to better education.²⁸¹

A similar argument is made, perhaps somewhat cynically, that if a collective bargaining agent were designated, then all matters of faculty

279. For example, perhaps this ruling is limited to supervisors participating in an employee unit rather than just being a non-participating member.

280. Michigan State University (University College, Dept. of Social Science), Case No. C69I-123, MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 14 (June 24, 1970).

281. Larsen, 'Collective Bargaining' Issues in the California State Colleges, 53 AAUP BULL. 217, 222 (1967).

concern would become related to terms and conditions of employment, since these are the only areas over which they are permitted to bargain.

Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.²⁸²

Notwithstanding this admonition, the terms academic and non-academic can and often do have wider meanings. Traditionally, professors have sought to establish criteria for admission into the profession and to enforce their own standards of good practice. They often seek effective influence in policy decisions on admission standards, curriculum content, degree requirements, grading standards, academic freedom, standards for student conduct and discipline, and procedures for appointment of department chairmen, deans and presidents. Finally, they seek to determine the conditions which affect the standards and quality of work performance such as promotions, tenure, course assignment, work schedules, work loads, allocation of space and secretarial help.²⁸³

In assigning these subjects to the general categories of academic and non-academic issues, it should be noted that each issue may fall into one of two overriding categories: issues affecting the faculty as a whole and issues having a special relevance for the individual faculty member.²⁸⁴ This dichotomy is important when establishing procedures to resolve disputes, for a procedure to define faculty salaries may be inappropriate to questions of broad educational policy.

The *Task Force Report* on faculty governance has identified four broad categories of issues that are the legitimate concern of the faculty. They are: (1) educational and administrative policies, (2) personnel administration, (3) economic issues, and (4) public issues and the institution.²⁸⁵

282. Brown, *supra* note 18, at 1075.

283. See generally TASK FORCE REPORT, *supra* note 4, at 27-32; Wollett, *supra* note 58, at 1023.

284. TASK FORCE REPORT, *supra* note 4, at 30.

285. *Id.* at 27-30.

(1) *Educational and Administration Policies*

Since administrative procedures often determine the process by which educational policies are implemented, they can be treated together. The basic issue is the mission or general direction an institution will take. The classification includes admission standards, content of curricula, degree requirements, grading standards, standards for academic freedom, standards for student conduct and discipline, and procedures for appointment of department chairmen, deans and presidents. These issues, most often concerning the faculty as a whole, are central to the educational program and define the professional role of a faculty member in his relationship to the university community. For this reason, any system of faculty governance should permit the faculty a leading role in making decisions affecting these interests. It is foreseeable that an administration, in an adversary setting, might argue that these subjects are management prerogatives, not requiring faculty consideration.

(2) *Personnel Administration*

This category would include appointments, promotion and tenure, course assignments, work schedules, work loads, the allocation of office space, secretarial help, and procedures for handling disputes and grievances. These issues often involve problems of equity and may engender explicit adversary interests of the faculty and the administration. It is in this area that the professor may find himself torn between the desire for professional autonomy and the desire as an employee to be treated equally and have better working conditions. In that regard, faculty members are interested in having a forum to present grievances. At the present time, in most institutions individual grievances are referred to successively higher levels in the administrative structure. Subjects in personnel administration may be classified as non-academic and it appears that substantial faculty influence in the process of policy formulations is needed to maintain fundamental concepts of professionalism.

(3) *Economic Issues*

In addition to a faculty member's obvious concern with the amount of his own compensation, and with the problems of interpersonal comparisons of ability and performance, there are at least three other economic areas which may concern him:²⁸⁶ (1) the legislative budget allocations to

²⁸⁶ *Id.* at 29-30.

his particular institution, which will determine whether educational objectives of the institution can be met; (2) allocation of available resources within major budgetary categories of the university, such as distribution of funds among faculty salaries, new buildings, etc.; and (3) the specific allocation of the above funds among various schools, departments, and ranks within the institution. Common problems in this last area include the distribution of salaries among the colleges of the university and among the ranks of the faculty. In many institutions in recent years where pressures to increase faculty size required hiring new and young personnel, there has been an accompanying increase in salaries for junior faculty members, but not for senior members.²⁸⁷ Obviously these issues would fit within the non-academic classification.

(4) *Public Issues and the Institution*

This category involves the institution's policies on questions having a direct and important effect on its operations, such as the proper relationship between government agencies. An example might be the R.O.T.C. relationship with institutions of higher education. It is foreseeable that colleges and universities will become increasingly involved in questions dealing with social problems and educational programs to meet them. Therefore, it is likely that faculties, as well as students, will have a larger role in speaking out on public issues that may not directly affect the university or the faculty member in his employment relationship, but which nevertheless will affect the institution's image. A topical example might be a faculty resolution against American involvement in the Viet Nam War. It is necessary that policies be made with respect to the extent and propriety of faculty members' engagement in these activities. These issues are somewhat related to issues of educational and administration policies and therefore would most likely be classified as academic subjects, although there may well be instances where they could arguably be non-academic.

The classification of academic and non-academic issues might suggest the subject areas which would be included and excluded from the scope of bargaining issues should collective bargaining develop at an institution. Clearly, these issues would be handled differently by different representative organizations, and a faculty will seek to obtain that form which it feels is most appropriate to its needs and the issues under consideration.

287. *Id.* at 29.

(b) *Legal Scope of Bargainable Issues*

As a faculty decides which type of organization it will choose to represent its interests, it should consider which areas affect its interests most directly, and which areas are most often at the root of disagreements between faculty and administration. If disagreements are primarily over non-academic subjects, then clearly a faculty's choice is among any of the alternative forms of representation or combinations of them. On the other hand, if they are primarily over academic subjects, then a question can be raised whether a collective bargaining agent could or should negotiate on these subjects. Does the administration have a duty to bargain over academic matters? Are these subjects more properly left to decision by an internal organization? Are such decisions residually retained by the administration as a management prerogative? Although management prerogatives might well be the result, there are strong arguments against such a result, and suggestions that a collective bargaining agent should involve himself in academic matters.

Private sector unions generally do not quarrel with the position that the ability of a private firm to determine such matters as the kind and quality of its products or services is and should remain a managerial prerogative. However, there are some categories of employees in the public sector who, by virtue of the nature of their occupations and professional interests, might claim to have a negotiable concern with the "mission" or goals of particular public agencies. For example, public school teachers may reasonably assert that they have a legitimate interest not only in compensation and "conditions" of employment, but also in the fundamental educational policies to be followed in a school system.²⁸⁸

Novel legislation could avoid this issue by excluding certain subject matter from the scope of collective bargaining in higher education. It is still too early, however, to tell whether this would be preferable to state legislation calling for a ". . . broad duty to bargain, modeled on the NLRA, which would leave legal questions to be decided by the courts and policy questions to be decided by the processes of collective bargaining."²⁸⁹

288. Smith, *supra* note 77, at 908. See also Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven Year History*, 67 MICH. L. REV. 1033, 1042-46 (1969); Wollett, *supra* note 58, at 1019-21.

289. Smith, *supra* note 77, at 904.

The Michigan act of 1965 was patterned after the NLRA prescribing a general obligation to bargain collectively on "wages, hours, and other terms and conditions of employment."²⁹⁰ NLRB interpretations of these subjects have enlarged their scope for employers that are subject to NLRB jurisdiction, to include as mandatory subjects of bargaining matters of pensions, bonuses, group insurance, grievance procedure, safety practices, seniority, procedures for discharge, layoff, recall, or discipline and the union shop.²⁹¹ On non-mandatory subjects the parties are free to bargain or not, but an employer's refusal to bargain over mandatory subjects results in the commission of an unfair labor practice.

Cases discussing the scope of bargaining issues for public employees in education are relatively rare. In *City of Madison v. Wisc. Emp. Rel. Bd.*,²⁹² it was held that teachers could not be deprived of the right to bargain over traditionally mandatory issues simply because these issues have a significant effect on non-labor policies. The employer had changed the school calendar, contending that this was a matter for consultation but not negotiation with the union. The court disagreed and upheld the State Board's finding that the school calendar had a direct and intimate relationship to the salaries and working conditions of the teachers because it established the number of days worked and the dates of the beginning and end of the school year.²⁹³ The court relied on a United States Supreme Court decision which held that the particular hours to be worked by butchers was a mandatory subject of bargaining under the NLRA. Though not directly responding to whether the school calendar was an issue of educational policy, the Wisconsin court stated what might be the result if the issue were purely academic. "The contents of the curriculum would be a different matter. Subjects of study are within the scope of basic educational policy and additionally are not related to wages, hours and conditions of employment."²⁹⁴

The lesson to be learned from this case is that the courts in all likelihood

290. See National Labor Relations Act, §§ 8(d) and 9(a), 29 U.S.C.A. §§ 159(d), 159(a) (1964); MICH. COMP. LAWS ANN. § 423.11 (1968).

291. See generally Note, *supra* note 197. For a listing of typical "non-economic" matters in public school collective bargaining agreements, see REHMUS & WILNER, *supra* note 6, at 28.

292. Joint School Dist. No. 8, *City of Madison v. Wisc. Employment Rel. Bd.*, 37 Wisc. 2d 483, 155 N.W.2d 78 (1967). This case involved a proceeding by a school board to reverse the order of the WERB which had directed that fact-finding procedures be instituted with respect to the dispute over the 1966-67 contract.

293. *Id.* at 490-91, 155 N.W.2d at 81-82.

294. *Id.* at 493, 155 N.W.2d at 82-83.

will not hesitate to define educational policies and other non-mandatory subjects of bargaining by interpreting the terms related to wages, hours and conditions of employment. A question which remains unanswered is whether, absent legislative specification, courts will interpret the above terms narrowly or broadly in determining the relationship between educational policies and economic conditions; and whether the courts will continue to analogize NLRB cases with those involving teachers and professors. An example of a future problem in higher education may be the question of class size. A broad construction would find this issue to be a mandatory subject of bargaining since the employer most likely would contend that smaller classes are economically unfeasible rather than educationally undesirable. Such a finding could promote additional conflicts between the employer and its faculty. To grant the faculty's demand for smaller classes may require a university to adjust an educational policy, perhaps by reducing the number of class offerings in the curriculum. Thus, it is difficult to reconcile the issue of whether class size would primarily concern "reasonable working conditions for the teacher"—an economic consideration, or "what would be the best learning conditions for children—an educational policy decision."²⁹⁵ Of course, collaborative discussions between faculty and administration are not precluded and agreement can be made dividing authority over this issue and others.

As stated earlier, precedents on the question of the proper scope of bargainable issues are scarce and for the most part deal with secondary rather than higher education. It is not always clear whether analogies made between the two are proper. It would be profitable to watch the developing law in this area to determine whether those faculties in higher education which choose a collective bargaining agent for economic issues might also have chosen one for some academic issues. Professor Donald Wollett, professor of law at the University of California at Davis, recently stated that despite what state statutes may declare as proper subjects for collective bargaining, a good rule of thumb seems to be: "If the organization has much bargaining power, everything is negotiable. If it has little or no bargaining power, nothing is negotiable."²⁹⁶

295. For a discussion of similar problems in New York's public education system, see Klaus, *supra* note 288, at 1042-47.

296. Wollett, *supra* note 1, at B-8.

4. *The Role of a Faculty Senate*

(a) *At an Institution with an External Bargaining Agent*

Even though an external bargaining agent is designated to represent faculty members, certain issues of educational policy may properly be assigned to an academic senate. How stable the relationship will be is another question. It has been argued that an academic senate would probably atrophy in the shadow of an external bargaining agent.²⁹⁷ The *Task Force Report* suggests that "the record of collective bargaining in industrial settings reveals a steady expansion of union concern and influence to topics previously identified as management prerogatives."²⁹⁸ By a parallel series of developments, this could take place in higher education. For example, the determination of admission standards may initially be assigned to the senate as an educational issue but soon appear on the bargaining agenda because of the consequences of admission policies on faculty work loads.

Obviously, if a collective bargaining agent is granted exclusive bargaining rights, the role of a senate could be very much diminished, especially if the admonitions regarding the union's desire to expand its subjects for bargaining materialize. Nevertheless, the *Task Force Report* recommends the establishment of an academic senate even when a bargaining agent has rights on a campus. The senate can continue to have a voice in educational policy decisions and be available to assist the faculty should the bargaining agent's power wane or should a majority of the faculty reject its representative status.²⁹⁹ In Michigan, MAHE (affiliate of NEA) President Dr. Bruce Nelson stated that a senate and an organization such as his could compatibly coexist.³⁰⁰ As to the AAUP's position, it has long regarded itself as a complementary body to an academic senate, and there are suggestions that, should it become a collective bargaining agent on a campus, it will strengthen the senate's role by contractually limiting the AAUP's jurisdiction over "all sorts of academic issues," reserving them for "prescribed internal procedures."³⁰¹

297. Brown, *supra* note 18, at 1076.

298. TASK FORCE REPORT, *supra* note 4, at 65.

299. *Id.*

300. *Serving Higher Education Faculties*, MICH. ED. J. 22 (1967).

301. Brown, *supra* note 18, at 1078; see also, *Letter Number Twenty-one—Relationship Between an AAUP Chapter and a Faculty Senate*, AAUP POLICY DOCUMENT AND REPORTS, 1969 ADVISORY LETTERS FROM WASHINGTON OFFICE.

(b) *As Appropriate Bargaining Agent*

If competing external organizations begin active competition over who will represent faculty members for purposes of collective bargaining, must the senate stand idly by? The answer depends on the current status of the law in each state. When a statute permits employee organizations to petition a state board for certification as bargaining representative, who is eligible to participate in an election? Usually any organization which demonstrates a sufficient showing of interest may participate. Does a faculty senate qualify as an employee organization?

The issue was first raised in New York where the senate of the State University of New York petitioned the state's Public Employment Relations Board (PERB) under the Taylor Law to be included among choices the faculty would have in an upcoming representation election.³⁰² The Board was asked to interpret whether the statutory term "employee organization" included the senate.³⁰³ In considering this question the Board naturally considered one of the purposes of the Taylor Law: "... [P]ublic employees shall have the right to participate in, or to refrain from forming, joining, or participating in, any employee organization of their choosing."³⁰⁴ PERB ruled that the senate was an employee organization within the meaning of the Taylor Law, because its primary purpose was to improve its members' terms and conditions of employment. The Board stated that the senate had represented the faculty position with regard to economic goals as well as a number of matters of educational concern such as admissions policies, faculty hiring, promotion and tenure procedures, curriculum and class size. It also said that many of these matters would constitute, to some degree, "negotiable terms and conditions of faculty employment."³⁰⁵

At the present time, the issue of whether a senate would be eligible to be a collective bargaining agent at a given institution retains two unresolved questions: Can a senate represent the faculty in bargaining when it includes members from management, that is, from the administration? Does the use of university facilities and the support provided

302. See generally Brown, *supra* note 18, at 1074.

303. Employee organization was defined as "an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees." N.Y. CIV. SERV. LAW § 201(6) (McKinney Supp. 1968).

304. *Id.* § 202. A semantical problem may exist with some senates where members do not join, but are members by virtue of their faculty status.

305. McHugh, *supra* note 271, at 62. This decision was appealed to the New York courts. As of this date, no decision has been rendered.

from university funds disqualify the senate, *i.e.*, is the senate thereby employer-dominated? Both of these questions are novel and have not as yet been legally resolved, although the second one is presently being decided in the New York courts.³⁰⁶

In the New York case the AFT, a participant in the election, contended that the senate was employer-dominated in that it was an arm of the university administration because it was incorporated in the university trustees' policies as the official agency through which the faculty participated in the governance of the university, and because it received financial support from the university.³⁰⁷ The AFT felt the senate should continue to function in academic matters, but another organization should advance the professionals' interests in collective negotiations concerning economic matters.

In response, the senate argued that it qualified definitionally under state law and that if it were deprived of certification as an employee organization under the Taylor Law it would be, as a practical matter, rendered ineffectual. This in turn would impair the traditional relationship the faculty has had with the university and inhibit faculty participation in university governance. Additionally, the senate argued, professionals in a university have a unique relationship to the university which is far different from that of industrial employees to management in the industrial sector. Therefore, traditional labor relations rules concerning dominance, financial support, and other unfair labor practices should not apply.³⁰⁸ PERB stated that it would not rule on either the domination or interference issues, since there were existing state unfair labor practice proceedings available to resolve such issues.³⁰⁹

Although the issue of whether a senate, as a collective bargaining agent, can have administration personnel in its membership and still qualify as a labor organization has not been specifically decided in New York or elsewhere, positions are being taken on the issue. One author has commented that an administration's financial support of a senate does not make it dependent on the administration, nor does it interfere with its autonomy. In stating that it would be ill-advised for an admin-

306. Of course it would appear that the problems could be avoided by excluding administrators from membership and by funding itself, as for example by charging senate members dues.

307. McHugh, *supra* note 271, at 44.

308. *Id.* at 61. See also Gov't. EMPLOYEE REL. REP. B-11, No. 312 (Sept. 1, 1969).

309. *Id.* at B-13.

istrative agency, rather than the faculty, to determine whether the faculty is independent, he argued that

. . . public support for a faculty senate, without distinction between its bargaining and other functions, is just as much a proper cost of the university's operation as is support for the administration or for the state labor relations board.³¹⁰

In Michigan a body of administrative decisions suggests that a university-funded, mixed senate would qualify as a labor organization and engage in collective bargaining. As noted earlier, recent state labor decisions indicate that administrators in education may be treated differently from other groups of public employees.³¹¹ In the *Michigan State University* case,³¹² the trial examiner stated that on the question of employer-domination by a faculty organization with administrators in its membership, it must be proved that the administrators interfere with employees' choice to speak freely or to join a labor organization which will bargain with the University. In deciding the case he stated:

[However] the undersigned is refusing to mechanically apply to a large university regulated by PERA the traditional concepts relative to a charge of domination or assistance of a labor organization under Section 8(a)2 of the [NLRA]. It is unrealistic to apply NLRA principles to the system of self-government by the University faculty. . . .³¹³

Although the *Michigan State* case concerned only one particular governing faculty, the holding supports the arguments raised by the senate at the State University of New York that traditional rules concerning dominance, financial support, and other unfair labor practices should not apply.³¹⁴ If the trend among college faculties of designating collective

310. Brown, *supra* note 18, at 1074-5. The author admitted, however, that "a state legislator might not take this view of an appropriation that would be used in part to extract even greater appropriations for faculty salaries." *Id.*

311. See text accompanying notes 276-283 *supra*. A recent New Jersey statute attempts to avoid difficulties associated with qualifying as a labor organization by permitting "any organization . . . by public employees . . . to act on [their] behalf . . ." N.J. STAT. ANN. § 34:13A-3(e) (Supp. 1968).

312. Michigan State University (University College, Dept. of Social Science), Case No. 69I-123, MICH. EMPLOYMENT REL. COMM'N LAB. OPS. 14 (June 24, 1970).

313. *Id.*

314. See note 308 *supra*.

bargaining agents continues, academic senates will undoubtedly attempt to qualify as labor organizations.

Should a senate, after qualifying as a labor organization and participating in a representation election, lose that election, a problem arises as to its subsequent function. Although it would be excluded from bargaining over terms and conditions of employment, it would still retain its sphere of influence over matters of academic importance to the same extent as it had before participating in the election. It is clear that a senate has nothing to lose by participating in a representation election.

V. CONCLUSION

In recent years, faculties of a minority of institutions of higher education have rejected traditional methods of self-government and have looked instead to the trade-union model. As faculties consider the alternatives, three areas of discussion arise: professional status, higher salaries, and participation in self-government.

By established custom, professors are independent persons who seek a type of self-government which can maintain their ideals of academic freedom, professional autonomy, and professional status. To many professors, the thought of a faculty union poses a threat to these ideals because they believe a union, with its industrial relations concepts, would encroach on their professional status. As professors see the present structure of public employee legislation, they have every reason to believe that these concepts would be applied to their situation.

Professors typically concern themselves with academic rather than non-academic matters. Whether some of the academic matters would be taken over by a collective bargaining agent is not certain; yet it is *likely* that some academic areas might be of legitimate concern to a union and therefore be a subject within the legal scope of bargaining.³¹⁵

Another area discussed by faculties considering alternative types of government is higher salaries which, many professors argue, a union can

315. See text accompanying notes 288-296 *supra*. Recent negotiated collective bargaining agreements between faculty and administration at City University of New York and Central Michigan University show that the traditionally academic or potentially academic subject areas of sabbaticals, teaching load and schedule, research requirements and committee assignments are now covered by contract provisions. This information is collected and further commented upon in an unpublished paper by this author. R. Brown, *The Faculty Senate as an Effective Alternative to Collective Bargaining in Higher Education: The University of Michigan Experience* (Aug. 1970) (LL.M. Thesis, University of Michigan).

obtain more successfully than a senate.³¹⁶ Salary gains by junior college teachers and some college faculties who have unionized are attractive to faculties who as yet are undecided on which system of self-government to adopt. Although this desire for higher salaries should not be minimized, studies show that it is not this factor which leads to faculty discontent and persuades them to form a union,³¹⁷ but rather it is their lack of ability to participate in decisions affecting their professional status.³¹⁸

In conclusion, therefore, it is hoped that with the controversy of union versus senate thus exposed and the criteria underlying the arguments pro and con listed and analyzed, a faculty facing a choice in this area can make an informed decision between methods of self-governance in the context of their own situation.

316. In a recent study by this author comparing salary and fringe benefits gained by faculties at City University of New York and Central Michigan University with the faculty at the University of Michigan, the following conclusion was reached. The unionized faculties gained yearly percentage increases of salary greater than Michigan's non-unionized faculty which uses the senate system of governance. However, the average percentage increases which were about 1.8 to 2.6 percent greater than Michigan's increases did not result in a disproportionate difference based on average compensation of the compared faculties. In fact, on the basis of average compensation, the University of Michigan faculty's compensation far exceeded that of Central Michigan and slightly exceeded some schools in the City University of New York system. *Id.*

317. This proposition and a proposition that a senate system is preferable to a union was overwhelmingly affirmed in a recent poll taken of members of the University of Michigan's Senate Assembly. *Id.* See also TASK FORCE REPORT, *supra* note 4, at 1, 12-13.

318. R. Brown, *supra* note 315.